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Supreme Court, U.S.
FILED

07 - 285 AUG 29 2007

No. 07-

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IN THE

Supreme Court of the United States

AMERICAN FUTURE SYSTEMS, INC. D/B/A PROGRESSIVE BUSINESS PUBLICATIONS,

Petitioner,

v.

BETTER BUSINESS BUREAU OF EASTERN PENNSYLVANIA AND BETTER BUSINESS BUREAU OF METROPOLITAN WASHINGTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Constitution require that a corporate defamation plaintiff be treated as a "limited purpose public figure" based upon the corporation's conducting direct mail and telephone solicitation as a part of its regular business, where the corporation did not inject itself into any public controversy?

CORPORATE DISCLOSURE STATEMENT

Petitioner has no parent corporation. No publicly held corporation owns 10% or more of petitioner's stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF APPENDICES iv

TABLE OF CITED AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED .. 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE PETITION ... 5

A. There is a Division Both Among the Circuits and Various State Appellate Courts Concerning the Proper Test for Determining Which Defamation Plaintiffs are Limited Purpose Public Figures. 6

B. The Pennsylvania Supreme Court Has Departed From This Court's Holding In *Gertz*. 9

CONCLUSION 12

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The Supreme Court Of Pennsylvania, Eastern District Decided May 31, 2007 ..... 1a

Appendix B — Opinion Of The Superior Court Of Pennsylvania Filed March 21, 2005 ..... 43a

Appendix C — Opinion Of The Philadelphia Court Of Common Pleas, First Judicial District Of Pennsylvania, Civil Trial Division Dated May 5, 2004 ..... 68a

TABLE OF CITED AUTHORITIES

Page

Cases:

Antwerp Diamond Exchange of America, Inc. v. Better Business Bureau, 637 P.2d 733 (Ariz. 1981) 9

Blue Ridge Bank v. Veribank, 866 F.2d 681 (4th Cir. 1989) 7

Bruno & Stillman v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980) 7, 8

Cottrell v. National Collegiate Athletic Association, __ So.2d __, 2007 Ala. LEXIS 104 (Ala. Jun. 1, 2007) 9

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 5, 6, 8, 9, 10, 11

Golden Bear Distributing Systems v. Chase Revel, Inc., 708 F.2d 944 (5th Cir. 1983) 8

Hutchinson v. Proxmire, 443 U.S. 111 (1979) 10

Long v. Cooper, 848 F.2d 1202 (11th Cir. 1988) ... 8

National Foundation for Cancer Research, Inc. v. Council of Better Business Bureaus, 705 F.2d 98 (4th Cir. 1983) 7, 8

Cited Authorities

Page

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 5, 7, 9, 10, 11

Porous Media Corp. v. Pall Corp., 173 F.3d 1109 (8th Cir. 1999) 8

Rosenblatt v. Baer, 383 U.S. 75 (1966) 9

Snead v. Redland Aggregates, 998 F.2d 1325 (5th Cir. 1993) 7-8

Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264 (3d Cir. 1980) 8

Tavoulareas v. Piro, 817 F.2d 762 (D.C. Cir. 1987) 7

Vegod Corp. v. American Broadcasting Co., 603 P.2d 14 (Cal. 1979) 8

Wilson v. Scripps-Howard Broadcasting Co., 642 F.2d 371 (6th Cir. 1981) 8

Wolston v. Reader's Digest Assoc., Inc., 443 U.S. 157 (1979) 10

United States Constitution:

First Amendment 1, 6

Fourteenth Amendment 1, 6

Cited Authorities

Page

Statute:

28 U.S.C. § 1257(a) 1

Other Authority:

Who is "Public Figure" For Purposes of Defamation Action, 19 A.L.R. 5th 1 (1994) 7

OPINIONS BELOW

The Pennsylvania Supreme Court opinion (App. 1a-42a) is reported at 923 A.2d 389. The Pennsylvania Superior Court opinion (App. 43a-67a) is reported at 872 A.2d 1202. The opinion of the trial court (App. 68a-81a) is unreported.

JURISDICTION

The Pennsylvania Supreme Court entered its judgment on May 31, 2007. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

The Fourteenth Amendment to the United States Constitution provides, in Section 1:

> . . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

Petitioner "AFS" is a privately held corporation that publishes specialized "fast-read format" newsletters focused on business-related topics. AFS is headquartered in Pennsylvania, and its fourteen branch offices are located in

Pennsylvania and New Jersey. AFS is one of the largest business newsletter publishers in the United States, and it solicits subscriptions to its newsletters by direct mail and telephone. AFS directs these solicitation efforts to individuals in businesses, and not to residences.

In 2001, Respondents ("BBB") published a report concerning AFS's sales practices, stating that AFS "has an unsatisfactory business performance record due to a pattern of customer complaints alleging billing for unordered merchandise. Some consumers have claimed that they cancelled subscriptions but their cancellations were not honored."

AFS wrote to BBB contesting the report and requesting a retraction. In particular, AFS notified BBB that the "pattern" of complaints constituted approximately only one out of every 12,500 orders placed with AFS. AFS further demonstrated that many of the complaints were false. In response, BBB updated the report, but continued to state that AFS "has an unsatisfactory business performance record . . . ."

AFS filed a defamation action against BBB in the Pennsylvania trial court in Philadelphia. The case proceeded to a jury trial. AFS tried the case on the theory that BBB acted negligently by publishing its defamatory report about AFS. At trial, BBB admitted that it made no effort to determine whether or not the complaints on which it based its report were legitimate. BBB simply received these complaints, concluded that AFS had an "unsatisfactory record," and published its defamatory report on the Internet. AFS contended that BBB's failure to investigate the complaints at issue constituted negligence.

The issue of whether AFS should be considered a public or private figure first arose when the trial judge asked counsel, in connection with fashioning jury instructions, "Are we proceeding on the basis that the plaintiff is a public figure? I didn't think we were, but you enlighten me." (Oct. 7, 2003 Tr. p. 228). AFS responded that it was proceeding on the basis that it was a private figure (*Id.*), a position that it repeated. (Oct. 8, 2003 Tr. pp. 70-72). During the conference concerning jury instructions that occurred after the close of the evidence, AFS submitted to the trial judge a memorandum in support of its position that it was a private figure and that "marketing" cannot make AFS a public figure where AFS did not inject itself into a public controversy. (Oct. 10, 2003 Tr. 81-82).

The trial judge expressly found that AFS was not a public figure because AFS did not have the "persuasive power and influence" required to be an all-purpose public figure, nor had AFS "thrust [itself] to the forefront of particular public controversies in order to influence the resolution of the issues involved." (Oct. 10, 2003 Tr. 89-90). Notwithstanding the ruling that AFS was a private figure, the trial judge refused to instruct the jury that it could return a defamation verdict for AFS based solely on a finding of negligence. Instead, over AFS's objections, the trial judge instructed the jury that BBB enjoyed a conditional privilege with respect to its publication of reports of consumer complaints, and that AFS was required to prove actual malice in order to overcome the privilege.

The jury returned a verdict for defendant, and the trial court denied AFS's motions for judgment *n.o.v.* or for a new trial. In its motion for a new trial, AFS asserted that the trial judge had correctly determined that AFS is a private figure and, therefore, erred in instructing the jury that BBB could

be liable only if AFS had proved actual malice. (Motion for Post-Trial Relief, ¶¶ 17-27).

AFS appealed to the Pennsylvania Superior Court, which affirmed the trial court's decision. (App. 43a). The Pennsylvania Supreme Court granted AFS's petition for allowance of appeal.

As the Pennsylvania Supreme Court recounted in its opinion, AFS consistently contended that it was a private figure. BBB did not argue to the contrary, either in opposition to AFS's post-trial motion or in its appellate briefs. However, after oral argument, the Pennsylvania Supreme Court directed the parties to submit supplemental briefs addressing whether AFS could be considered a limited purpose public figure.

In its opinion, the Pennsylvania Supreme Court agreed with AFS that, as a matter of Pennsylvania law, BBB did not have a conditional privilege requiring AFS to establish actual malice. However, the Pennsylvania Supreme Court held that, *as a matter of Federal constitutional law*, AFS was a limited purpose public figure, requiring AFS to prove that BBB acted with actual malice. Therefore, the court affirmed the judgment in favor of BBB.[1]

[1] In its opinion, the Pennsylvania Supreme Court acknowledged that under the circumstances, "it is possible that the jury found all elements of the cause of action to have been proved, except for malice." (App. 8a, fn. 4).

REASONS FOR GRANTING THE PETITION

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court adopted the concept that the actual malice requirement of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), is applicable to defamation plaintiffs who, while not public officials or all-purpose public figures, should be considered as public figures for a limited purpose. *Gertz*, at 351-52. The Court described the latter category as existing where "an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Id.* at 351. The Court stressed that it is necessary to look "to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Id.* at 352.

In *Gertz*, the Court held that the plaintiff was not the type of limited purpose public figure who falls within the actual malice requirement, because "he never discussed [the issue] with the press and was never quoted as having done so. He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome." *Id.* at 352.

In this case, the Pennsylvania Supreme Court held that AFS was required to satisfy the *New York Times* actual malice requirement, as a limited purpose public figure, even though (1) there was no "controversy" existing at the time BBB published its reports, but instead the "controversy" was of BBB's own creation; and (2) AFS had not voluntarily injected itself into a controversy, through advertising or widespread communication to the general public, but instead was found to be a public figure merely because of its regular conducting of business directed, not at the general public, but at its actual

or potential business customers. Specifically, the Pennsylvania Supreme Court held that AFS was a limited purpose public figure solely because of its direct mail and telephone solicitation activities, and the tangential relationship of those activities to the subject of the BBB report.

In so holding, the Pennsylvania Supreme Court has made a ruling based upon the Federal Constitution that typifies a division of opinion among various circuits as well as among appellate courts of various states. The Pennsylvania court also blurred the test this Court adopted in *Gertz* to the point where virtually any corporate plaintiff suing for defamation with respect to statements concerning its alleged business practices would be a limited purpose public figure.

Because the Pennsylvania Supreme Court's decision departs from the test under *Gertz*, and because the circuits and the state courts are divided on the proper test for determining whether plaintiffs in general and specifically corporate plaintiffs are limited purpose public figures under the First and Fourteenth Amendments, this Court should grant review and reverse the Pennsylvania court's decision.

A. There is a Division Both Among the Circuits and Various State Appellate Courts Concerning the Proper Test for Determining Which Defamation Plaintiffs are Limited Purpose Public Figures.

Since this Court's decision in *Gertz* over 30 years ago, this Court has not had occasion to further define the constitutional standards under which a defamation plaintiff must be considered a limited purpose public figure required

to prove actual malice under *New York Times*. This has spawned a large number of inconsistent federal and state appellate decisions.[2]

For example, in *Tavoulareas v. Piro*, 817 F.2d 762, 772-73 (D.C. Cir. 1987), the District of Columbia Circuit announced a limited purpose public figure test wholly at odds with the holding of the Pennsylvania Supreme Court in this case. Under *Tavoulareas*, the controversy has to be the subject of public discussion in which the plaintiff voluntarily decides to participate. In contrast, the Pennsylvania Supreme Court purports to adopt the Fourth Circuit's test in *National Foundation for Cancer Research, Inc. v. Council of Better Business Bureaus*, 705 F.2d 98 (4th Cir. 1983), as refined in *Blue Ridge Bank v. Veribank*, 866 F.2d 681 (4th Cir. 1989), under which the controversy need not be an issue of preexisting interest to the public, but instead can arise from the plaintiff's own business practices.

A further conflict is found with the First Circuit's decision in *Bruno & Stillman v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980), which held that criticism of commercial conduct does not involve a public issue of such a nature as to justify the actual malice test. Other circuits have tests involving greater or lesser degrees of flexibility, but which still emphasize the public nature of the controversy and the question of whether the plaintiff voluntarily injected itself into the controversy. *See, e.g., Snead v. Redland*

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[2] A lengthy annotation, collecting various "public figure" cases and demonstrating various patterns and inconsistencies is found in *Who is "Public Figure" For Purposes of Defamation Action*, 19 A.L.R. 5th 1 (1994).

Aggregates, 998 F.2d 1325, 1329 (5th Cir. 1993); *Wilson v. Scripps-Howard Broadcasting Co.*, 642 F.2d 371, 375 (6th Cir. 1981); *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1119 (8th Cir. 1999); *Long v. Cooper*, 848 F.2d 1202 (11th Cir. 1988).

There is also a striking conflict between courts analyzing whether a corporate plaintiff may become a public figure by merely marketing its products or services. For example, the Third and Fourth Circuits have found corporate plaintiffs to be public figures because of their advertisement practices. *See National Foundation for Cancer Research*, 705 F.2d at 101 (holding corporate plaintiff thrust itself into public eye through advertisements); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 273-274 (3d Cir. 1980) (holding company invited public comment and criticism and was a limited purpose public figure because of its advertising campaign). Several other Circuits, and the highest courts of several states, have strongly disagreed. *See Long*, 848 F.2d at 1204-05 (corporate plaintiff did not become limited purpose public figure through its advertising because such advertising "in no way attempted to influence the outcome of the alleged controversy"); *Golden Bear Distributing Systems v. Chase Revel, Inc.*, 708 F.2d 944 (5th Cir. 1983) (holding a corporation did not "'thrust itself' into a public controversy by merely advertising its services"); *Bruno & Stillman*, 633 F.2d 583 (holding that the law of defamation would largely be obliterated if companies were public figures by successfully operating); *Vegod Corp. v. American Broadcasting Co.*, 603 P.2d 14, 18 (Cal. 1979) (rejecting argument that a corporation becomes a public figure "by selling goods to the public and by advertising");

Antwerp Diamond Exchange of America, Inc. v. Better Business Bureau, 637 P.2d 733, 737 (Ariz. 1981) (holding plaintiff was private figure and rejecting defendant's argument that plaintiff was a public figure based on "widespread and far-flung mail and solicitation campaigns").

The day after the Pennsylvania Supreme Court decided this case, the Alabama Supreme Court decided *Cottrell v. National Collegiate Athletic Association*, __ So.2d __, 2007 Ala. LEXIS 104 (Ala. Jun. 1, 2007). There, in contrast to the Pennsylvania Supreme Court's approach here, the Alabama Supreme Court in *Cottrell* conducted an extensive analysis of the pre-existing nature of the public controversy at the time of the alleged defamation and whether the plaintiff voluntarily thrust himself into that controversy.

It is difficult to think of any other area of Federal constitutional law where there are so many divergent tests applied by various circuits and state courts. This case presents the Court with an opportunity to give further definition to the limited purpose public figure test and to create greater uniformity in application of the important First Amendment concepts under *New York Times* and *Gertz* to what otherwise are cases that should turn on the application of state law.

B. The Pennsylvania Supreme Court Has Departed From This Court's Holding In *Gertz*.

As noted above, this Court in *Gertz* created a narrow category of defamation plaintiffs who, while not public officials, nevertheless would fall within the *New York Times* requirement of proving actual malice. This Court did so in the context of an individual's level of prominence gained by

willing participation in an issue that already was of public interest.

In this case, the Pennsylvania Supreme Court's decision eliminates the fine lines that the Court drew in *Gertz*, and instead decided an issue of Federal constitutional law in a manner that elevates a disputed statement concerning a corporation's ordinary business practices to a level of constitutional magnitude worthy of protection under *New York Times*. There is no support for such a result in this Court's precedent. *See Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979) (defendant's defamatory statement cannot be the basis for finding plaintiff to be a public figure); *see also Wolston v. Reader's Digest Assoc., Inc.*, 443 U.S. 157, 167-68 (1979) (emphasizing that to be a public figure, plaintiff must voluntarily enter a public controversy that exists apart from the defamatory publication).

Although *Gertz* emphasizes that states ordinarily are free to fashion their own rules of defamation liability, the Pennsylvania Supreme Court expressly ruled in favor of AFS on the state law issue and instead grounded its decision against AFS on Federal constitutional law. In so doing, the Pennsylvania Supreme Court has stretched the application of the constitutional limits on liability under certain situations worthy of protection to a point where they would unduly interfere with the assertion of rights that should exist solely as a matter of state law.

The protection of reputation is of fundamental importance to businesses. In our system, the state law of defamation serves that purpose, which the Court has

recognized as a "pervasive and strong" societal interest. *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966). Courts must balance the equally fundamental interests that the First and Fourteenth Amendments protect by requiring the enhanced level of culpability under *New York Times* in only those limited situations where necessary to protect those constitutional interests. The necessity of such a balance is a strong theme in *Gertz*.

The Pennsylvania Supreme Court's decision here destroys this balance. The Pennsylvania court's opinion does not articulate any meaningful way to distinguish corporate defamation plaintiffs whom the Constitution requires to prove actual malice from those who are not subject to the actual malice requirement. Under the Pennsylvania court's reasoning, it is difficult to imagine any corporate defamation plaintiff suing for injury to its business reputation that would not be treated as a limited purpose public figure.

As the protection of reputation becomes of greater importance to businesses in this Internet environment, the potential for harm to the interests that state law should protect becomes greater if other courts follow the Pennsylvania Supreme Court's departure from the *Gertz* approach to demarcating the Federal and state interests. Although a state might decide to impose an actual malice requirement as a matter of its own law, a state does not have the ability to pin such a requirement on the Federal Constitution in a manner that alters the balance that this Court has established. Therefore, this is an issue worthy of this Court's review.

CONCLUSION

This Court should grant the petition for a writ of certiorari to review the decision of the Pennsylvania Supreme Court.

Respectfully submitted,

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August 29, 2007

APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT DECIDED MAY 31, 2007

IN THE SUPREME COURT OF PENNSYLVANIA EASTERN DISTRICT

No. 46 EAP 2005

AMERICAN FUTURE SYSTEMS, INC. D/B/A PROGRESSIVE BUSINESS PUBLICATIONS,

Appellant

v.

BETTER BUSINESS BUREAU OF EASTERN PENNSYLVANIA AND BETTER BUSINESS BUREAU OF METROPOLITAN WASHINGTON,

Appellee

ARGUED: April 3, 2006

OPINION

MR. JUSTICE SAYLOR DECIDED: May 31, 2007

The primary issues for resolution in this defamation case are whether consumer reporting agencies enjoy a conditional privilege that can only be defeated by showing actual malice, and under what circumstances a corporation can become a limited-purpose public figure by virtue of its advertising and solicitation activities.

Appendix A

Appellant, American Future Systems, Inc., doing business as Progressive Business Publications, publishes specialized "fast-read format" newsletters targeted to career-oriented individuals. These newsletters focus on business-related topics such as sales, marketing, advertising, financial management, business management, human resources, and safety and regulatory compliance. Appellant sells its newsletters through direct mail solicitations and a sales force of approximately 500 telemarketers from fifteen separate offices across the nation, and solicits 15,000 new subscriptions each week. The telemarketers call customers at their place of employment during regular business hours to offer them "no-risk" trial subscriptions to the newsletters. If a customer agrees to the trial offer, the telemarketer obtains the customer's date of birth (excluding year) for verification purposes. According to Appellant, it confirms each order by sending a fax or email to its customer within twenty-four hours after the order.

The trial subscription includes two issues of the newsletter free of charge, but to cancel, the customer must write "cancel" on the first invoice. Invoices are sent monthly and, although they request payment, they do not state the cancellation policy and do not contain Appellant's phone number. If the first invoice is not returned to Appellant with "cancel" written upon it and no payment is immediately forthcoming, Appellant sends a second invoice, not to the customer, but to the accounts payable department of the customer's employer. Consistent with the trial offer, Appellant's policy is to terminate, without further obligation, any subscription for which a cancelled invoice is received within six months after the initial phone call. After six months

of non-payment, however, past-due accounts are sent to a collection agency. A typical annual subscription price is approximately $300.00, and ninety-two percent of the subscriptions are cancelled. Appellant has its headquarters in Malvern, Pennsylvania, and is owned by Edward Satell ("Satell"), who retains a 98 percent interest in the company. According to Satell, the company's gross revenues have risen every year and totaled $29 million in 2002.

In 2001, the Better Business Bureau published a report concerning Appellant's sales practices. The report covered a three-year period beginning in 1998, and stated:

> While this company responds to customer complaints presented to it by this Bureau, this company has an unsatisfactory business performance record due to a pattern of customer complaints alleging billing for unordered merchandise. Some consumers have claimed that they cancelled subscriptions but their cancellations were not honored.

Better Business Bureau Reliability Report, March 2001, at 1. The second page of the report contained the following disclaimer:

> As a matter of policy, the Better Business Bureau does not endorse any product, service, or company. [The Bureau's] reports generally cover a three-year reporting period, and are provided solely to assist you in exercising your own best judgment. Information contained in this report is

> believed to be reliable but not guaranteed as to accuracy. Reports are subject to change at any time.

Id. at 2.[1]

Upon learning of the report in early 2001, Satell wrote to the Bureau contesting the report and seeking its retraction. In particular, Satell explained that Appellant records its telemarketers' calls for training purposes, and, because Appellant collects customers' birthdates, it can disprove claims of unordered merchandise. Satell also noted that, in view of the 15,000 new subscriptions received each week, the number of complaints that the Bureau receives is extremely small by comparison.

As a result, the Better Business Bureau updated the report to state:

> While this company responds to customer complaints presented to it by this Bureau, this

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1. This Commonwealth has historically permitted some conditional privileges to be defeated upon a showing of actual malice. *See e.g. Dempsky v. Double,* 386 Pa. 542, 547, 126 A.2d 915, 917 (1956); *Biggans v. Foglietta,* 403 Pa. 510, 512, 170 A.2d 345, 346 (1961) (if the court determines that the alleged defamatory publication is privileged and there is no intrinsic or extrinsic evidence of malice, the court has a duty to direct a nonsuit or give binding instructions for the defendant); *Corabi,* 441 Pa. at 452, 273 A.2d at 909 ("[I]f the privileged occasion is but a qualified one and it be shown that defendant was actuated by malice, the defense of qualified privilege is vitiated."). Therefore, it would not be contrary to established precedent to require an actual malice standard for a private-figure plaintiff to overcome a conditional privilege.

> company has an unsatisfactory business performance record due to a pattern of customer complaints alleging billing for unordered merchandise. Some consumers have claimed that they cancelled subscriptions but their cancellations were not honored. On March 16, 2001, [Appellant] responded to the [the Bureau] concerning the company's unsatisfactory business performance report. The company sells its publications through telemarketing solicitations. It claims that it tape records telephone solicitations for quality control purposes. The company states that it obtains the ordering person's birthdate to verify the order at a later date. According to the correspondence, orders are confirmed by fax within 24 hours, giving the orderer an opportunity to respond. The company claims it has a liberal cancellation policy permitting the customer to cancel anytime within the first three months of the telephone order and receiving a refund on all unsent issues. New subscribers receive two free issues with the right to cancel according to the company. The company claims that its [Better Business Bureau] complaint volume is negligible compared to its volume of business.

Better Business Bureau Reliability Report, April 2001, at 1. The updated report included the same disclaimer contained in the earlier one.

Dissatisfied, and following unsuccessful attempts to resolve the unsatisfactory rating, Appellant filed a defamation

action against the Better Business Bureau, seeking compensatory and punitive damages and alleging that the Bureau failed to investigate the statements made in the reliability reports, which it contended were false and defamatory.[2]

At the seven-day jury trial, Appellant claimed that the Better Business Bureau published the statements negligently because, contrary to the Bureau's operations manual requiring it to thoroughly substantiate customer complaints before relying on them, the Bureau made no effort to determine whether such complaints were true prior to issuing the reliability reports. Further, Appellant alleged that the Bureau failed to determine whether the complaints were representative of the company as a whole, considering the size of its business. Satell testified that Appellant saw a reduction in profits as a result of the report.

The Bureau adduced documentary evidence of over one hundred complaints it received from customers stating that they had been billed by Appellant for unordered

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2. In its initial complaint, Appellant named the Eastern Pennsylvania affiliate as the sole defendant. Because the latter had ceased operations more than one year previously, *see* 42 Pa.C.S. § 5523(1) (setting forth a one-year statute of limitations for defamation actions), Appellant was granted leave to file an amended complaint in which it added the Washington, D.C. affiliate as an additional defendant. The amended complaint also alleged, as separate causes of action, commercial disparagement and tortious interference with existing and prospective business relations. Those counts were ultimately dismissed, and are not at issue in this appeal.

merchandise.[3] The Bureau additionally presented the testimony of multiple witnesses who had had unsatisfactory dealings with Appellant. One witness testified that she was unable to cancel her subscription by following Appellant's stated procedure of writing "cancel" on the initial invoice and returning it, and that other individuals in her small business had experienced the same difficulty. *See* N.T. October 9, 2003, at 135-39. Other witnesses stated that Appellant had billed them for newsletters they did not order; the newsletters arrived in an envelope resembling junk mail, as did the invoices; the invoices did not include Appellant's phone number or cancellation policy; after discarding such items believing them to be junk mail, they began receiving calls from a collection agency and were thereafter unable to cancel their subscriptions; and their subscriptions were only cancelled after they either complained to the Better Business Bureau or had an attorney contact Appellant. *See id.* at 99-106, 118-22, 131.

It was undisputed at trial that Appellant expends half a million dollars per year on marketing, and that at least $2 million in revenue is generated annually through collection agencies. In this regard, one of the Bureau's witnesses testified that she paid the bill after being contacted by a collection agency, not because she believed she had ordered a subscription from Appellant, but solely to ensure that her

3. Although the court only admitted into evidence the substance of complaints filed within the three-year period covered by the report, the Bureau's regional vice president testified that the volume of complaints concerning Appellant has increased to nearly 400 per three-year reporting period. *See* N.T. October 10, 2003, at 19, 25.

company's credit rating did not suffer. *See* N.T. October 9, 2003, at 100-02.

Over Appellant's objection, the trial court charged the jury that the Better Business Bureau enjoyed a conditional privilege in connection with the issuance of reports of consumer complaints. The court further instructed that, to overcome this privilege, Appellant was required to demonstrate that the Bureau published a false and defamatory communication with actual malice, that is, with knowledge that it was false or with reckless disregard as to its truth or falsity. *See Masson v. New Yorker Magazine*, 501 U.S. 496, 510-11, 111 S.Ct. 2419, 2429-30, 115 L.Ed.2d 447 (1991); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S.Ct. 710, 726, 11 L.Ed.2d 686 (1964). Over the Bureau's objection, however (which was renewed after the charge was delivered), the court refused to instruct the jury that Appellant was a public figure. The jury ultimately rendered a verdict in favor of the Better Business Bureau, and completed a verdict form reflecting a finding that the Bureau did not defame Appellant.[4]

Appellant moved for post-trial relief, requesting judgment notwithstanding the verdict or, in the alternative, a new trial, and asserting, *inter alia*, that the trial court had erred by instructing the jury that the Bureau was entitled to a

4. Because there were no special interrogatories, it is not clear from the verdict form whether the jury's finding of no defamation was based upon a determination that actual malice was not demonstrated, or upon some other ground. Thus, it is possible that the jury found all elements of the cause of action to have been proved, except for malice.

conditional privilege requiring Appellant to prove actual malice. Rather, Appellant argued, the Bureau did not retain any conditional privilege and, moreover, because the court had determined that Appellant was a private-figure plaintiff, it only needed to prove negligence on the part of the Bureau in publishing false and defamatory statements. The trial court denied post-trial relief and eventually issued an opinion under Rule of Appellate Procedure 1925(a) in support of such denial. *See* Pa.R.A.P. 1925(a).

In its opinion, the trial court observed that the determination of whether a communication is conditionally privileged is a question for the court, and that a publication is conditionally privileged if the publisher reasonably believes that the recipient shares a common interest in the subject matter and is entitled to know the information conveyed. Because the Bureau is a consumer reporting agency, the court stated that the disputed publication clearly met this standard. The court additionally explained that, once it found that a conditional privilege applied, whether such privilege was abused was a factual question for the jury. *See generally Bargerstock v. Washington Greene Cmty. Action Corp.*, 397 Pa.Super. 403, 411, 580 A.2d 361, 364 (1990). As for the plaintiff's burden of proof on that issue, the court referenced Section 600 of the Second Restatement of Torts for the position that the plaintiff must show that the defendant published the allegedly false and defamatory statement with actual malice (as opposed to mere negligence). On this topic, the court recognized that both the comment to the Restatement and the subcommittee note to Section 13.09 of the Pennsylvania Suggested Standard Civil Jury Instructions explain that, if mere negligence were sufficient to abuse a

conditional privilege, the policy on which the conditional privilege was based would no longer be served. *See* Restatement (Second) of Torts § 600 (1977), official cmt. b; Pennsylvania Suggested Standard Civil Jury Instructions § 13.09, subcommittee note 2 (2003).[5] Therefore, the trial court stated that it had correctly omitted any reference to negligence in its jury instructions regarding abuse of a conditional privilege, and had properly instructed the jury that the privilege should only be deemed abused if malice was proven. *See American Future Sys. v. Better Business Bureau of Eastern Pa.*, No. 00520, Nov. Term 2001, *slip op.* at 4-6, 2004 WL 5235105 (C.P. Phila. May 5, 2004).

A unanimous panel of the Superior Court affirmed in a published opinion. While the panel acknowledged that negligence may be sufficient to defeat a claim of conditional privilege where the plaintiff is a private figure and the speech

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5. The trial court acknowledged that, in some reported cases, a defendant's negligence in publishing a defamatory statement has been deemed sufficient to constitute an abuse of a conditional privilege. *See Bargerstock*, 397 Pa.Super. at 411, 580 A.2d at 364; *Green v. Mizner*, 692 A.2d 169, 175 (Pa.Super.1997) ("An abuse of a conditional privilege occurs . . . when the publication is actuated by malice or negligence [.]"). The court interpreted other decisions, however, as establishing a malice prerequisite. *See Berg v. Consolidated Freightways, Inc.*, 280 Pa.Super. 495, 421 A.2d 831 (1980) (determining that a trial court's charge to the jury requiring malice was consistent with a conditional privilege); *Doman v. Rosner*, 246 Pa.Super. 616, 371 A.2d 1002 (1977) (finding that an alleged libelous statement was not capable of a defamatory meaning and, even if it was, the statement concerned a public figure and was subject to a qualified privilege requiring plaintiff to show defendant acted with malice).

does not involve a matter of public concern, it indicated that statements on topics involving a recognized public interest are at the heart of the First Amendment's protections. *See* U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."). Thus, the panel ultimately agreed with the trial court that malice was required to abuse the conditional privilege in the present case, because the Better Business Bureau's statements pertained to consumer complaints about Appellant's sales practices, which the panel deemed to touch upon a matter of public concern. *Cf. Unelko Corp. v. Rooney*, 912 F.2d 1049, 1056 (9th Cir.1990) (finding that a statement concerning the effectiveness of a consumer product addressed a matter of public concern). Accordingly, the Superior Court panel found no error in the trial court's jury charge. *See American Future Sys. v. Better Business Bureau of Eastern Pa.*, 872 A.2d 1202, 1210-11 (Pa.Super.2005).

We initially allowed appeal to consider whether a private-figure plaintiff seeking to recover damages resulting from speech on matters of public concern must prove actual malice, either due to the existence of a conditional privilege on the part of the speaker, or as a general proposition.[6] After hearing

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6. As used in this discussion, the term "actual malice" (sometimes shortened to "malice") is a term of art that refers to a speaker's knowledge that his statement is false, or his reckless disregard as to its truth or falsity. Thus, it implies at a minimum that the speaker " 'entertained serious doubts about the truth of his publication,' . . . or acted with a 'high degree of awareness of . . . probable falsity.' " *Masson v. New Yorker Magazine*, 501 U.S. 496, 510, 111 S.Ct. 2419, 2429, 115 L.Ed.2d 447 (1991) (quoting *St. Amant*

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argument, we entered an order permitting the parties to file supplemental briefs on the issue of whether Appellant is a limited-purpose public figure. As there are no relevant facts in dispute concerning these matters, their resolution involves questions of law over which our review is plenary. *See U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914, 938 (3d Cir.1990) (noting that the classification of a claimant as a public or private figure is a "question of law to be determined initially by the trial court and then carefully scrutinized by an appellate court"); *accord Schwartz v. American Coll. of Emergency Physicians*, 215 F.3d 1140, 1145 (10th Cir.2000); *Bongiovi v. Sullivan*, 122 Nev. 556, 138 P.3d 433, 445 (2006). *Brown v. Philadelphia Tribune Co.*, 447 Pa.Super. 52, 58, 668 A.2d 159, 162 (1995).

Because one individual's speech has the ability to harm another person's reputation, there is an inevitable tension in the law between the goals of protecting freedom of expression and safeguarding reputation from unjust harm. *See generally Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342, 94 S.Ct. 2997, 3008, 41 L.Ed.2d 789 (1974); *Norton v. Glenn*, 580 Pa. 212, 228, 860 A.2d 48, 58 (2004) (referring to the "seesawing balance between the constitutional rights of freedom of expression and of safeguarding one's reputation"). On one side of the equation, the Court in *New York Times* determined that the First Amendment limits the reach of state defamation

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v. Thompson, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 216, 13 L.Ed.2d 125 (1964)). This term "should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will." *Id.*

laws. *See New York Times*, 376 U.S. at 269, 84 S.Ct. at 720; *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 755, 105 S.Ct. 2939, 2943, 86 L.Ed.2d 593 (1985). On the other side, this Court has indicated that reputational interests occupy an elevated position within our state Constitution's system of safeguards,[7] and hence, in the context of defamation law the state Constitution's free speech guarantees are no more extensive than those of the First Amendment. *See Sprague*, 518 Pa. at 439, 543 A.2d at 1085; *Norton*, 580 Pa. at 229, 860 A.2d at 58 ("[S]ince we have found that the First Amendment does not encompass [the neutral reportage doctrine], we conclude that the Pennsylvania Constitution does not as well.").

Presently, the trial court identified a privilege held by "consumer reporting agencies to issue fair and accurate reports of consumer complaints" as constituting such a common law doctrine triggering the malice requirement. Appellant suggests, however, that this does not reflect a limitation extant under prevailing First Amendment jurisprudence. Rather, it argues, it is properly seen as a

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7. While the Pennsylvania Constitution, as well as the First Amendment, protects freedom of speech and of the press, *see* Pa. Const. art. I, § 7, the state charter places reputational interests on the highest plane, that is, on the same level as those pertaining to life, liberty, and property. *See* Pa. Const. art. I, §§ 1, 11; *Sprague v. Walter*, 518 Pa. 425, 438-39, 543 A.2d 1078, 1084 (1988). *See generally Norton v. Glenn*, 580 Pa. 212, 225-26, 860 A.2d 48, 56 (2004) (" 'The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being. . . .' " (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 22, 110 S.Ct. 2695, 2708, 111 L.Ed.2d 1 (1990))).

remnant of the pre- *New York Times* paradigm which gave the plaintiff certain evidentiary and procedural advantages, including a presumption that any defamatory statement was false and was made maliciously. We find merit in Appellant's contention.

Under Pennsylvania's common law regime, the defendant was strictly liable for the publication of a defamatory statement unless he could prove that the statement was true, *see Sprague*, 518 Pa. at 441 n. 8, 543 A.2d at 1086 n. 8,[8] or that it was subject to a privilege. For such a privilege to arise, the communication must have been "made upon a proper occasion, from a proper motive, in a proper manner and based upon reasonable and probable cause." *Dempsky v. Double*, 386 Pa. 542, 546-47, 126 A.2d 915, 917 (1956). Only after the defendant established privilege did the plaintiff bear the burden of demonstrating that the privilege was abused. In some instances, the plaintiff could show abuse of the privilege by proving the defendant's "[w]ant of reasonable

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8. The common law's presumption of falsity of a defamatory statement was based on several grounds, including that an individual accused of wrongdoing was presumed innocent, the defendant was better positioned to prove affirmative facts contained in the statement-particularly as it is difficult to prove a negative-and the plaintiff was generally barred from offering good-character evidence in his case in chief. *See Hepps v. Philadelphia Newspapers*, 506 Pa. 304, 311-12 & n. 1, 485 A.2d 374, 378-79 & n. 1 (1984), *rev'd on other grounds*, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986). As a federal constitutional matter, the burden has now been shifted to the plaintiff (even a private one) to show falsity, at least where the speech is on a matter of public concern. *See Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 777, 106 S.Ct. 1558, 1564, 89 L.Ed.2d 783 (1986).

care and diligence to ascertain the truth," *i.e.*, negligence. *Morgan v. Bulletin Co.*, 369 Pa. 349, 354, 85 A.2d 869, 872 (1952) (quoting *J. Hartman & Co. v. Hyman & Lieberman*, 287 Pa. 78, 84, 134 A. 486, 488 (1926)). In other instances, the Court formulated the plaintiff's burden by reference to "legal malice," signifying a wrongful, intentional act, committed without justification or excuse. *See, e.g., Corabi v. Curtis Publ'g Co.*, 441 Pa. 432, 451, 273 A.2d 899, 909 (1971); *cf. Briggs v. Garrett*, 111 Pa. 404, 414, 2 A. 513, 521 (1886), *quoted in Morgan v. Bulletin Co.*, 369 Pa. 349, 353-54, 85 A.2d 869, 872 (1952) (utilizing the term "actual malice" to denote legal malice). This scheme developed during an era in which the First Amendment was inapplicable to the law of libel. *See Roth v. United States*, 354 U.S. 476, 486, 77 S.Ct. 1304, 1310, 1 L.Ed.2d 1498 (1957); *Beauharnais v. Illinois*, 343 U.S. 250, 266, 72 S.Ct. 725, 735, 96 L.Ed. 919 (1952). The policy underlying the doctrine was that

> the public interest and the advantage of freedom of publication, in each particular class of cases thus protected, outweigh the occasional private and personal damage thereby caused. It is deemed in certain classes of cases more advantageous for the community at large that particular individuals should occasionally be damaged with impunity, than that men under the exceptional circumstances should not be at liberty to speak and publish what they reasonably believe to be true, although it may be defamatory of the character of individuals.

Williams v. Kroger Grocery & Baking Co., 337 Pa. 17, 19, 10 A.2d 8, 9 (1940).[9]

While the pre- *New York Times* decisions of this Court are not entirely consistent as to whether "legal malice" or mere negligence was required to demonstrate abuse of a privilege, *cf. supra* note 5 (reflecting a similar inconsistency in the decisions of the Superior Court), it is worth noting that the doctrine of privilege functioned more as an affirmative defense within the strict liability framework than a mechanism to augment the level of fault that a plaintiff was required to prove. In any event, state law pertaining to common law privileges was affected in the latter part of the Twentieth Century by the United States Supreme Court's decisions constitutionalizing aspects of defamation law.

In particular, the Supreme Court began applying the First Amendment to this area of the law in 1964 in *New York Times;* a decade later, the *Gertz* Court determined that, although "the States retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual," *Gertz*, 418 U.S. at 345-46, 94 S.Ct. at 3010, they may not impose liability without fault. *See id.* at 347, 94 S.Ct. at 3010. In the wake of *New York Times* and *Gertz* this Court concluded that the former Pennsylvania state law conditional privileges (at least

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9. The common-law privilege, sometimes termed a "defeasible immunity," arose when the statement was made by a person having "a social or moral duty" to convey the information, and the recipient also retained an interest in or duty to receive the information. *Kroger Grocery*, 337 Pa. at 19-20, 10 A.2d at 9; *see also Nagle v. Nagle*, 316 Pa. 507, 511, 175 A. 487, 489 (1934).

those that could be overcome by a showing of negligence) had "lost their significance" because, "[i]f a private-figure plaintiff is to maintain any cause of action at all, he must minimally establish the negligence on the part of the publisher. In doing so, 'he has by that very action proved any possible conditional privilege was abused.' " *Hepps v. Philadelphia Newspapers, Inc.*, 506 Pa. 304, 323, 485 A.2d 374, 384-85 (1984) (quoting Restatement (Second) of Torts, Topic 3, Title A, Special Note, at 259 (1977)), *rev'd on other grounds*, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986).

The closest analog to a privilege which could have applied at trial in the present matter was a "defeasible immunity" as described in *Kroger's Grocery. See supra* note 9. As that decision explained, inherent in the definition of the privilege was the concept that in certain instances speakers must "be at liberty to speak and publish what they reasonably believe to be true, although it may be defamatory of the character of individuals." *Kroger Grocery*, 337 Pa. at 19, 10 A.2d at 9. This formulation reflects a negligence standard for overcoming the privilege, as it requires not only a belief in the truth of the challenged statement, but a reasonable one. It is also consistent with the general standard articulated in the first Restatement of Torts, Section 601 of which clarified that a conditional privilege was abused whenever the individual had "no reasonable grounds" for believing that the defamatory matter was true, Restatement (First) of Torts § 601 (1938), a construct officially recognized as encompassing a negligence test. *See id.*, Official Comment a ("The negligence of the publisher in making unqualified statements of fact without knowledge of circumstances which

would lead a reasonable man to believe them to be true, is an abuse of the occasion.") Finally, any privilege that the Bureau retained in this case was clearly analogous to a credit reporting agency's "conditional privilege to publish defamatory matter" recognized in *Baird v. Dun & Bradstreet*, 446 Pa. 266, 274, 285 A.2d 166, 171 (1971), which could be overcome by a showing of negligence rather than malice. *See id.* at 275, 285 A.2d at 171.

The import of the above discussion concerning the common-law framework extant in Pennsylvania prior to *New York Times*, the Supreme Court's decisions constitutionalizing defamation law, and the negligence standard inherent in the common-law definition of a number of conditionally privileged occasions, is that, post- *Gertz*, every defamation defendant is privileged at least to the extent contemplated in *Kroger's Grocery*, *Baird*, and Section 601 of the First Restatement. Logically, then-and as suggested above in relation to *Hepps*-this renders the former concept of a conditionally privileged occasion embodying the negligence standard superfluous in the present era. The only way to avoid this conclusion would be to permit such pre-existing privileges to be judicially reformulated so that the plaintiff must prove actual malice, rather than negligence, to prevail. Such reformulations would be in substantial tension with the developments alluded to above in *Sprague* and, especially, *Norton*, where the Pennsylvania Constitution was construed to highly prioritize reputational interests so as to preclude any departure from the level of fault expressly required by the First Amendment for media reportage of government proceedings. In short, as a matter of common-law decisionmaking, Pennsylvania courts will not strengthen-

for post- *Gertz* purposes-conditional privileges previously defined by reference to negligence principles so that, now, they may only be defeated by proving actual malice. This is essentially what the trial court did in the present case.[10]

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10. Our holding in this regard has no effect on previously recognized privileges that conferred absolute immunity in certain defined circumstances. *See, e.g., Bochetto v. Gibson*, 580 Pa. 245, 251, 860 A.2d 67, 71 (2004) ("Pursuant to the judicial privilege, a person is entitled to absolute immunity for communications which are issued in the regular course of judicial proceedings and which are pertinent and material to the redress or relief sought." (internal quotation marks omitted)); *Corabi*, 441 Pa. at 452 & n. 9, 273 A.2d at 909 & n. 9. Nor should it be understood to foreclose legislative creation of privileges which may, within constitutional limitations, require a showing of fault greater than negligence. Indeed, the General Assembly is better suited than the judiciary to balance the social policy considerations involved in determining when potentially defamatory speech warrants special protection beyond that guaranteed by the Constitution, *see Corabi*, 441 Pa. at 451, 273 A.2d at 909 ("The basis of the defense of privilege is public policy [.]"), particularly as any such rule would affect the litigants' substantive rights. *See generally Conner v. Quality Coach*, 561 Pa. 397, 417, 750 A.2d 823, 834 (2000) ("[T]o the extent that litigants' substantive rights are to be substantially altered, modified, abridged or enlarged on the basis of public policy centered upon the protection of the public fisc through elimination of pass-through costs, such a rule, if appropriate, will have to originate in the legislative branch."); *Naylor v. Township of Hellam*, 565 Pa. 397, 408, 773 A.2d 770, 777 (2001) (recognizing the Legislature's superior ability to examine social policy issues and determine legal standards so as to balance competing concerns); *Glenn Johnston Inc. v. Commonwealth, Dep't of Revenue*, 556 Pa. 22, 30, 726 A.2d 384, 388 (1999) (emphasizing that policy determinations are generally within the sphere of the Legislature); *Pegram v. Herdrich*, 530 U.S. 211, 221, 120 S.Ct. 2143, 2150, 147 L.Ed.2d 164 (2000) (same).

Notwithstanding the above, and apart from any common law privilege, the Bureau argues that actual malice is nonetheless the required standard under the First Amendment because the speech at issue pertained to a matter of public concern. *See* Brief for Appellee at 19 (citing, *inter alia*, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985)).[11] The Bureau finds support for this position in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971) (plurality opinion), which was issued after *New York Times* but before *Gertz*. The *Rosenbloom* plurality stated that regardless of whether a plaintiff was "famous or anonymous," the appropriate standard for liability was actual malice whenever the statement related to a matter of public concern. *See id.* at 43-44, 91 S.Ct. at 1819-20; *see also Matus v. Triangle Publ'ns, Inc.*, 445 Pa. 384, 395, 286 A.2d 357, 363 (1971) (plurality opinion) (concluding that *Rosenbloom* binds this Court and requires defamation plaintiffs to prove actual malice where the statement relates to a matter of public concern). The difficulty is that three years later, the *Gertz* Court essentially disavowed the plurality's determination in this regard, and concluded that the First Amendment does not force states to require a showing of actual malice where a private person's reputation is harmed, even where the speech pertains to a matter of public or general interest. *See Gertz*, 418 U.S. at 346, 94 S.Ct. at 3010. Accordingly, this Court has, since *Matus*, recognized that any focus on whether the speech is of public or private concern has been replaced by an inquiry into whether the plaintiff is a public

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11. Appellant concedes for purposes of this appeal that the Bureau's reliability reports involved a matter of public concern. *See, e.g.*, Brief for Appellant at 3.

or private figure. *See Hepps v. Philadelphia Newspapers, Inc.*, 506 Pa. 304, 319 n. 6, 485 A.2d 374, 382 n. 6 (1984), *rev'd on other grounds*, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986). *See generally Rutt v. Bethlehems' Globe Publ'g Co.*, 335 Pa.Super. 163, 186, 484 A.2d 72, 83 (1984) (discussing the effect of *Gertz* on *Matus*); John J. Watkins & Charles W. Schwartz, *Gertz and the Common Law of Defamation: Of Fault, Nonmedia Defendants, and Conditional Privileges*, 15 Tex. Tech L.Rev. 823, 829 (1984) ("This [*Gertz*] reformation not only dramatically altered the common-law scheme . . . but also returned to importance the distinction between public and private plaintiffs that had been rendered virtually meaningless by *Rosenbloom.*").[12]

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12. Eleven years after *Gertz*, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759, 105 S.Ct. 2939, 2945, 86 L.Ed.2d 593 (1985), a plurality of Justices endorsed (albeit in dicta) the position seemingly disavowed in *Gertz*. *See* Nat Stern, *Private Concerns of Private Plaintiffs: Revisiting a Problematic Defamation Category*, 65 Mo. L.Rev. 597, 602 (2000) ("While *Gertz* had apparently rejected basing plaintiffs' evidentiary hurdles on the subject matter of libelous statements, *Dun & Bradstreet* reintroduced this approach to defamation doctrine."). The following year, a majority of Justices reaffirmed the position that speech of public-concern is subject to greater First Amendment protection than that of exclusively private concern. *See Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 774-75, 106 S.Ct. 1558, 1562-63, 89 L.Ed.2d 783 (1986). Four years after that, however, in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990), the Court re-stated the framework for analyzing the First Amendment limitations on the states' ability to protect reputation under defamation law. *Milkovich* adhered to the *Gertz* formulation by developing that, where a statement on a matter of public concern "implies false and defamatory facts regarding public figures or

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Under *Gertz*, therefore, the appropriate standard of fault depends on whether the plaintiff is a public or private figure. *See Gertz*, 418 U.S. at 343, 94 S.Ct. at 3008-09 (articulating that "the state interest in compensating injury to the reputation of private individuals requires a different rule should obtain with respect to them" as compared to public figures). If the plaintiff is a public official or public figure, *see Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 164, 87 S.Ct. 1975, 1996, 18 L.Ed.2d 1094 (1967) (extending the actual malice requirement to public figures who are not governmental officials), and the statement relates to a matter of public concern, then to satisfy First Amendment strictures the plaintiff must establish that the defendant made a false and defamatory statement with actual malice. *See Gertz*, 418 U.S. at 343, 94 S.Ct. at 3008-09; *Milkovich*, 497 U.S. at 14-15, 20, 110 S.Ct. at 2703, 2706-07. In contrast, states are free to allow a private-figure plaintiff to recover by establishing that the defendant acted negligently rather than maliciously. The Superior Court has adopted this test, *see Rutt*, 335 Pa.Super. at 186, 484 A.2d at 83 ("[A] private figure defamation plaintiff, seeking compensation for harm inflicted as a result of the publication of defamatory matter, must prove

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officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth"–i.e. actual malice, *id.* at 20, 110 S.Ct. at 2707 (citing *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967)), whereas states may impose liability on a lesser basis as to statements about a private figure on a matter of public concern, so long as they require some showing of fault. *See id.* at 20-21, 110 S.Ct. at 2707.

that the defamatory matter was published with 'want of reasonable care and diligence to ascertain the truth' or, in the vernacular, with negligence."), and at least one federal court has predicted that this Court will do so as well. *See Wilson v. Slatalla*, 970 F.Supp. 405, 414 n. 2 (E.D.Pa.1997). Indeed, we do find this to be the appropriate standard relative to a private-figure plaintiff for the reasons discussed above pertaining to the Pennsylvania Constitution's protections in the area of reputational interests, and in view of our understanding of the United States Supreme Court's present interpretation of the First Amendment. *See supra* note 12.

This analysis contrasts with the framework employed by the trial court and Superior Court, under which those tribunals indicated that a private-figure plaintiff could be required to shoulder the burden of proving that the defendant acted with actual malice when issuing consumer reports. *See American Future Systems, Inc.*, 872 A.2d at 1210. In light of this discrepancy, and because the jury did not specify its basis for its finding of no defamation, *see supra* note 4, we allowed supplemental briefing because of our concern that Appellant may not be a private figure, but may instead be a limited-purpose public figure relative to the statements at issue. If Appellant is a public figure for this purpose, then the trial court's error was harmless, as the First Amendment would require a showing of actual malice to support liability. *See Masson*, 501 U.S. at 510, 111 S.Ct. at 2429; *Gertz*, 418 U.S. at 342, 94 S.Ct. at 3008; *Ertel v. Patriot-News Co.*, 544 Pa. 93, 99, 674 A.2d 1038, 1041 (1996). *See generally Aldridge v. Edmunds*, 561 Pa. 323, 334, 750 A.2d 292, 298 (2000) (reciting that a new trial is not warranted in a civil

case in spite of a trial court's error where the error did not cause prejudice).

Appellant preliminarily urges us not to resolve this case based on the public-figure/private-figure distinction because, in its view, the Better Business Bureau waived any objection to Appellant's designation as a private figure by failing to raise it before the Superior Court. *See* Supplemental Brief for Appellant at 6-7. As noted, however, the Bureau preserved its objection to Appellant's classification at trial and, as the complete verdict winner, lacked standing to appeal the common pleas court's adverse ruling. *See* Pa.R.A.P. 501; *United Parcel Svc. v. Pennsylvania Pub. Util. Comm'n*, 574 Pa. 304, 315, 830 A.2d 941, 948 (2003). Having prevailed before the Superior Court, the Bureau similarly lacked standing to cross-appeal to this Court. Thus, the concept of waiver is not applicable to the issue of whether the trial court erred in denominating Appellant a private-figure plaintiff. Were we to ignore the question, moreover, we would fail to "make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499, 104 S.Ct. 1949, 1958, 80 L.Ed.2d 502 (1984) (internal quotation marks omitted); *see Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20-21, 110 S.Ct. 2695, 2706-07, 111 L.Ed.2d 1 (1990) (suggesting that the enhanced appellate review required by *Bose Corp.* applies to determinations as to public-figure versus private-figure status pursuant to the *Gertz* framework). Thus, we are not impeded in addressing the issue of Appellant's classification before deciding whether to remand for a new trial. *See generally McAdoo Borough v.*

Commonwealth, Pa. Labor Relations Bd., 506 Pa. 422, 428 n. 5, 485 A.2d 761, 764 n. 5 (1984) ("It is well settled that this Court may affirm for any reason and is not limited to grounds raised by the parties."); *Commonwealth v. Booth*, 564 Pa. 228, 245, 766 A.2d 843, 852 (2001) ("Having determined that the Superior Court's analysis does not support its conclusion, we may nevertheless affirm that conclusion if it is correct on any other ground."); *Bell v. Yellow Cab Co.*, 399 Pa. 332, 337, 160 A.2d 437, 440 (1960).

Recognizing that public figures assume special prominence in the affairs of society, *Gertz* observed that two characteristics are particularly relevant to such designation, namely, the ability to rebut the defamatory statements due to greater access to the channels of communication than private individuals, *see Gertz*, 418 U.S. at 344, 94 S.Ct. at 3009 ("Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy."), and voluntary exposure to controversy, *see id.* at 345, 94 S.Ct. at 3010 (indicating that "public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them."). Further, *Gertz* determined that the classification as a public figure arises in two circumstances: first, referring to an "all purpose" public figure, the Court explained that, "in some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts." *Id.*, 418 U.S. at 351, 94 S.Ct. at 3013. Alternatively, a "limited purpose public figure," which

according to the Court is more common, is an individual who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Id.* To determine such status, the Court instructed that it is necessary to consider the "nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Id.* at 352, 94 S.Ct. at 3013; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 246 n. 3, 106 S.Ct. 2505, 2509 n. 3, 91 L.Ed.2d 202 (1986).

Traditionally, a plaintiff could only be considered a limited-purpose public figure relative to a pre-existing controversy in which he elected to participate. *See Rutt*, 335 Pa.Super. at 181-82, 484 A.2d at 81; *cf. Hutchinson v. Proxmire*, 443 U.S. 111, 134-35, 99 S.Ct. 2675, 2688, 61 L.Ed.2d 411 (1979) (noting that a defamation plaintiff does not become a public figure simply because the news media give him an opportunity to respond). More recently, however, some courts have held that a controversy may be created by a plaintiff's own activities, particularly with respect to widespread public solicitation and advertisements. In *National Foundation for Cancer Research (NFCR) v. Council of Better Business Bureaus*, 705 F.2d 98 (4th Cir.1983), for example, the court addressed whether NFCR could recover from the Council of Better Business Bureaus based upon an allegedly defamatory report concerning the Foundation's use of donated funds. The report stated that NFCR did not meet the Council's standards-which required a charitable institution to spend a reasonable percentage of its total income on program services-and further described aspects of NFCR's fund-raising campaign materials as inaccurate and

misleading. The Fourth Circuit ultimately determined that NFCR was a limited-purpose public figure in relation to the public controversy surrounding its solicitation and use of funds. The court rejected NFCR's claim that the only controversy was a private dispute regarding the Council's evaluation of the charity, explaining that "[e]ven though the 'public controversy' which formed the basis of this lawsuit arose almost entirely from the Foundation's solicitation and use of funds for its cancer research, the mere fact that the NFCR generated the controversy does not preclude a finding that there was, in fact, a controversy." *Id.* at 101. The court continued:

> The evidence is uncontroverted that the Foundation had thrust itself into the public eye, not only through its massive solicitation efforts (almost 68 million pieces of direct mail solicitation in the past three years), but also through the claims and comments it made in many of these solicitations where it extolled its judicious use of donated funds in finding a cure for cancer, where it declared its objective to make "NFCR a household word," and where it asserted the need "to present [NFCR's] case to the jury of the American people." The Foundation vigorously sought the public's attention, and succeeded to a substantial degree, as is reflected by the approximately $25,000,000 it raised in the past three years and the numerous inquiries the [Council of Better Business Bureaus] had received

> from the public and the media regarding NFCR. It was these inquiries which in fact led the Council to undertake its evaluation.

Id.

A similar result was reached by the Third Circuit in *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264 (3d Cir.1980). In that matter, the court determined that an Ohio corporation became a limited-purpose public figure by virtue of the extensiveness of its outreach to the public in attempting to sell its beef products upon entering the Pittsburgh area. While *Steaks Unlimited* recognized that one *Gertz* factor supporting limited-purpose public figure status concerns greater-than-normal access to the media, it additionally noted that *Gertz* itself had clarified that a "more important" factor is

> "a compelling normative consideration underlying the distinction between public and private defamation plaintiffs." Simply stated, public figures are "less deserving of (judicial) protection . . . because they have 'voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.' " In other words, public figures effectively have assumed the risk of potentially unfair criticism by entering into the public arena and engaging the public's attention.

Steaks Unlimited, 623 F.2d at 273 (ellipsis in original) (quoting *Gertz*, 418 U.S. at 344, 94 S.Ct. at 3009, and *403 *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 164, 99 S.Ct.

2701, 2706, 61 L.Ed.2d 450 (1979)); *see also Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 589-90 (1st Cir.1980) (recognizing that, although many corporations have no particular advantage over private persons in gaining access to the channels of communication, the factor of "thrusting" one's self into the public eye via promotional efforts is "more significant" under *Gertz*). The *Steaks Unlimited* court observed that the plaintiff had launched an intensive advertising campaign upon entering the Pittsburgh area where it sought to sell its goods, and that the local bureau of consumer affairs, as well as the defendant local television station, had received numerous contacts from area customers complaining that the company was misrepresenting the type and quality of the beef being sold. Under these circumstances, the Third Circuit determined that the plaintiff was a public figure for the limited purpose of commentary concerning its products and sales practices.

Presently, Appellant insists that, in its telephone solicitations, it neither promoted its business performance record nor denied that it had ever become the subject of consumer complaints. Since these were the topics of the contested statements issued by the Better Business Bureau, Appellant argues that any comparison between the present matter and *NFCR* is misplaced, particularly as *NFCR* premised its holding on the fact that the plaintiff had employed its advertising campaign to highlight its careful use of donated funds, which was the very topic of the contested report in that matter. In this regard, Appellant also points out that the Fourth Circuit has since clarified that the designation of NFCR as a limited-purpose public figure was based, not only on the fact of extensive promotional

advertising, but upon a "direct relationship between the promotional message and the subsequent defamation (indicating plaintiff's pre-existing involvement in the particular matter of public concern and controversy)." *Blue Ridge Bank v. Veribanc, Inc.*, 866 F.2d 681, 687 (4th Cir.1989). Thus, because the Fourth Circuit now deems both elements necessary, the *Blue Ridge Bank* court declined to find that a bank was a limited-purpose public figure based solely on its extensive promotional campaign, as the bank had not raised the subject of the defamatory statements-its corporate financial health-in its advertisements. *See id.* at 687-88.

We find the analysis of *NFCR*, as modified by *Blue Ridge Bank*, persuasive and adopt its framework. While we recognize, as Appellant argues, that *Blue Ridge Bank* limited *NFCR's* holding to cases in which there is, *inter alia*, a subject-matter nexus between the content of the plaintiff's public solicitations and advertisements on the one hand, and the allegedly defamatory report at issue on the other, we believe that such is the case here. For present purposes, we may assume that Appellant is correct in asserting that its telephone solicitors neither promoted its business performance record nor denied that consumers occasionally complain about its order-cancellation policy. Nevertheless, it is undisputed that the telemarketers touted the cancellation policy and the purported lack of any risk in ordering a subscription; the Bureau's reports had at their core these same issues, as they reflected consumer complaints regarding such things as Appellant's alleged failure to honor cancellation requests and its decision to omit its phone number or cancellation policy from its invoices, thus depriving the

employer's corporate offices (which may not know whether the order is valid, *see*, *e.g.*, N.T. October 9, 2003, at 139) of a readily available means to request cancellation or inquire as to the validity of the invoice. Accordingly, here, as in *NFCR*, there is a subject-matter overlap between the promotional message and the allegedly defamatory speech. This, in turn, militates in favor of a determination that Appellant became a public figure for the limited purpose of commenting upon its sales practices under the *NFCR/ Blue Ridge Bank* framework.

As revealed at trial, moreover, Appellant expended significant time and resources in soliciting business and making its products known. Its campaign employed a force of 500 telemarketers at fifteen locations throughout the country to solicit 15,000 customers each week. Appellant's telemarketing director testified that these employees made approximately 25 million phone calls per year and actually spoke with 2.2 million business executives annually. *See* N.T. October 7, 2003, at 138-39. Pursuant to Appellant's invoicing policy, once the free subscription period passed, Appellant billed the customer and, if unpaid or not cancelled, the customer's employer, thus generating gross revenues of $29 million in 2002 alone. As a result of these practices, hundreds of complaints were sent to the Better Business Bureau, and the statements of the Better Business Bureau were limited to reporting its receipt of such complaints and concluding that Appellant's business record was "unsatisfactory" on the basis of this pattern of complaints. Thus, we find that Appellant's national sales campaign and its "no-risk" offer resulted in a controversy concerning the

authenticity of such practices, which invited comment regarding those aspects of its business.

Finally, while Appellant maintains, with some validity, that companies should not be deemed limited-purpose public figures merely because they open their doors for business or advertise their products,[13] inquiries into limited-purpose

13. *See, e.g., Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 589 & n. 6 (1st Cir.1980) (boat manufacturer was not a public figure merely by being in business or advertising to some extent); *Golden Bear Distrib. Sys. of Texas v. Chase Revel, Inc.*, 708 F.2d 944, 952 (5th Cir.1983) (stating that the "mere fact of advertising" does not render a business a public figure); *Vegod Corp. v. American Broad. Cos.*, 25 Cal.3d 763, 160 Cal.Rptr. 97, 603 P.2d 14, 18 (1979) ("[A] person in the business world advertising his wares does not necessarily become part of an existing public controversy."); *Bank of Oregon v. Independent News, Inc.*, 298 Or. 434, 693 P.2d 35, 42 (1985); *see also Antwerp Diamond Exch. v. Better Business Bureau of Maricopa County*, 130 Ariz. 523, 637 P.2d 733, 737 (1981) (corporation's mail and telephone solicitations were insufficiently widespread to render corporation a public figure); *Worldnet Software Co. v. Gannett Satellite Info. Network*, 122 Ohio App.3d 499, 702 N.E.2d 149, 155 (1997) (software company was not a public figure where its Internet advertising was not "extensive"). *But see Sunshine Sportswear & Elecs., Inc. v. WSOC Television, Inc.*, 738 F.Supp. 1499, 1507 (D.S.C.1989) ("Just as the plaintiffs had the means to conduct their advertising campaigns, they could have used the same means to refute any criticism they received from the defendants. Accordingly, ... plaintiffs were public figures with regard to the controversy surrounding the broadcast [criticizing plaintiffs' merchandising practices]."); *Parker v. Evening Post Publ'g Co.*, 317 S.C. 236, 452 S.E.2d 640, 644 n. 3 (Ct.App.1994) ("[B]y extensively advertising his return to the car business, Parker ... invited the public's attention and assumed the accompanying risk of that attention. Thus, as to statements regarding Parker's dealership, it seems clear that Parker is a public figure.").

public figure status are particularized and fact-sensitive, *accord Bruno & Stillman*, 633 F.2d at 589; *Snead v. Redland Aggregates Ltd.*, 998 F.2d 1325, 1329 (5th Cir.1993), and cannot be resolved solely by reference to such a broad proposition. *See generally Snead*, 998 F.2d at 1329 ("[T]rying to decide whether a particular plaintiff is a public or private figure is much like trying to nail a jellyfish to the wall. The inquiry becomes even more difficult when the libel plaintiff is a corporation [.]" (internal quotation marks omitted)). Here, Appellant's promotional efforts were vast, and, as noted, a subject-matter nexus existed between the Bureau's reports and the content of the sales pitch used by Appellant's telemarketers. Additionally, Appellant is a publishing company with an on-going direct-mail solicitation component and millions of customers on its mailing list. As such, it has greater access to the channels of effective communication than ordinary private citizens for purposes of counteracting statements it perceives as false. *See Gertz*, 418 U.S. at 344, 94 S.Ct. at 3009. Under all of these circumstances, we are satisfied that, consistent with *NFCR/Blue Ridge Bank* and *Steaks Unlimited*, Appellant was a public figure for the limited purpose of commentary concerning its business practices. Therefore, to establish its defamation claim, Appellant was required to prove that the Better Business Bureau published its statements with actual malice. Because the trial court instructed the jury that this precise level of fault was required for recovery, albeit on an erroneous basis, the trial court's error was harmless.

Accordingly, we affirm.

Former Justice NEWMAN did not participate in the decision of this case.

Mr. Chief Justice CAPPY and Justices CASTILLE, EAKIN and BAER join the opinion.

Madame Justice BALDWIN files a concurring opinion.

Appendix A

CONCURRING OPINION

MADAME JUSTICE BALDWIN

DECIDED: May 31, 2007

While I join the majority's result and agree to affirm, I would affirm the Superior Court's analysis of the conditional privilege, rather than relying on the limited-purpose public figure analysis reached by the majority. Justice Saylor, writing for the majority, in reliance on *Williams v. Kroger Grocery Baking Co.*, 337 Pa. 17, 10 A.2d 8 (1940) and *Hepps v. Philadelphia Newspapers, Inc.*, 506 Pa. 304, 324, 485 A.2d 374, 385 (1984), *rev'd on other grounds*, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986), concludes that the concept of common law conditional privilege may no longer alter the level of fault that a defamation plaintiff must prove in order to recover compensatory damages, and that ordinary negligence is sufficient for liability to attach where the plaintiff is a private figure. Majority slip op. at 13-16. The majority indicates that "the concept of a conditionally privileged occasion embodying the negligence standard" has been rendered superfluous by the application of the First Amendment to defamation law. *Id.* at 15. Such a conclusion fails to take into consideration the public policy reasons which gave rise to the conditional privilege originally and unnecessarily eliminates the heightened protection historically afforded by the recognized common law conditional privileges.

"A privileged communication is one made upon a proper occasion, from a proper motive in a proper manner and based

upon reasonable and probable cause." *Baird v. Dun and Bradstreet*, 446 Pa. 266, 275, 285 A.2d 166, 171 (1971). "The basis of the defense of privilege is public policy. That is, conduct which otherwise would be actionable is to escape liability because the defendant is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation." *Corabi v. Curtis Pub. Co.*, 441 Pa. 432, 451, 273 A.2d 899, 909 (1971) (citations omitted). *See also Elia v. Erie Ins. Exchange*, 430 Pa.Super. 384, 392, 634 A.2d 657, 660 (1993) ("Examples of such occasions giving rise to conditional privileges are: (1) when some interest of the publisher of the defamatory matter is involved; (2) when some interest of the recipient of the matter, or a third party is involved; or (3) when a recognized interest of the public is involved.").

The concept of privileged communications evolved under Pennsylvania common law when the law of defamation presumed the defamatory statement to be false, placing on the defendant the burden of proving that it was true. In addition to demonstrating the truth of the statements, the defendant was permitted to avoid liability by asserting the defense of privilege to make the statements. *Corabi*, 441 Pa. at 452, 273 A.2d at 909. Unless the defendant demonstrated that the statement came within some legal privilege, the statement was presumed to have been made with malice. Once the defendant had pled and proved the elements of privilege, it became the plaintiff's burden to prove that the statements were made with actual malice. *Sprague v. Walter*, 518 Pa. 425, 441 n. 8, 543 A.2d 1078, 1086 n. 8 (1988).

Appendix A

The United States Supreme Court has since abrogated states' ability to assign liability without fault, which had required the defendant to bear the burden of proving the truth of its assertions. In so doing, this jurisprudence has significantly affected the extent and necessity of the common law conditional privilege. However, while the conditional privilege in its historical form has been abrogated, I disagree with the majority that it has lost all of its significance.

In *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) and *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967), the United States Supreme Court held that public officials or public figures could not recover damages for a defamatory falsehood absent proof that the statement was made with "actual malice," that is, that it was made with knowledge of or reckless disregard for the falsity of the statement.

With respect to defamatory falsehoods regarding public officials or public figures, the courts of this Commonwealth routinely apply the *New York Times* standard requiring a showing of actual malice. *See Sprague*, 518 Pa. at 437, 543 A.2d at 1084; *Ertel v. Patriot-News Co.*, 544 Pa. 93, 100, 674 A.2d 1038, 1041 (1996). Consequently, with respect to public officials or public figures, the common law conditional privileges have lost their value because the constitutional protection set forth in *New York Times* requiring actual malice gives at least as much protection as the common law conditional privilege. As such, with respect to plaintiffs who are public figures or public officials, I agree with the majority that the conditional privilege has lost its significance.

Appendix A

With respect to private-figure plaintiffs, the United States Supreme Court has determined that when the defamatory falsehood is injurious to a private individual, the states may define for themselves the appropriate standard of liability so long as they do not impose liability without fault. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 324, 94 S.Ct. 2997, 2999, 41 L.Ed.2d 789 (1974). Accordingly, the majority in the instant case, in reliance on *Gertz*, concludes that if a private-figure plaintiff is to maintain any cause of action at all he must at a minimum establish negligence on the part of the publisher, since there can be no liability without fault. Majority op. at __, 923 A.2d at 400. The majority then reasons, however, that in light of *Gertz*, the conditional privileges have lost their significance even with respect to private-figure plaintiffs. Relying on *Kroger* and *Hepps*, the majority finds that the standard for overcoming a conditional privilege is still negligence. If a conditional privilege can be defeated by a showing of negligence, the privilege no longer serves any purpose since, according to *Gertz*, private-figure plaintiffs must necessarily establish negligence in order to maintain any cause of action. *Hepps*, 506 Pa. at 324, 485 A.2d at 385. I disagree with this holding and would instead find that where the plaintiff is a private figure and the matter falls within one of the recognized conditional privileges, the level of fault may be elevated from negligence to actual malice.

In *Hepps*, we indicated in *dicta* and in reliance on a comment to the Restatement (Second) of Torts, that "[i]f a private figure plaintiff is to maintain any cause of action at all, he must minimally establish the negligence on the part of the publisher. In so doing, 'he has by that very action

proved any possible conditional privilege was abused.' " *Hepps*, 506 Pa. at 324, 485 A.2d at 385. This Court's statement in *Hepps* rests upon an incomplete analysis of case law and the Restatement (Second) of Torts and can hardly be said to constitute an affirmative holding that in all circumstances, conditional privileges are overcome by a showing of negligence.

The comment to the Restatement on which *Hepps* relies commences with an analysis of the conflict created by the fact that prior to *Gertz*, the Restatement (First) of Torts had recognized negligence as sufficient to overcome a conditional privilege. The comment acknowledges that *Gertz* required all plaintiffs to demonstrate negligence, at a minimum, in order to sustain a cause of action and thus many traditional conditional privileges may be defeated without a change in the level of fault that must be demonstrated. However, the comment additionally indicates that:

> One important effect of this is that courts will be more cautious in holding that a conditional privilege exists. Under circumstances when the court feels that the defendant should be held liable for defamation if he is merely negligent, as distinguished from being reckless, then it should hold that a conditional privilege does not exist in the particular situation. It will thus fully accomplish its purpose of holding the defendant liable if he was negligent.

Restatement (Second) of Torts, Special Note to Topic 3, Title A, Conditional Privileges and the Constitutional Requirement

of Fault (1977). Clearly, if the negligence standard is applied to determine abuse of a conditional privilege, then conditional privileges no longer have any effect. However, as the Restatement (Second) of Torts acknowledges:

> One consequence of this holding [*Gertz*] is that mere negligence as to falsity, being required for all actions of defamation, is no longer treated as sufficient to constitute abuse of a conditional privilege. Instead, knowledge or reckless disregard as to falsity is necessary for this purpose. . . .
>
> The courts will now find it necessary to reassess the circumstances under which it is appropriate to grant a conditional privilege. If a proper adjustment of the conflicting interests of the parties indicates that a publisher should be held liable for failure to use due care to determine the truth of the communication before publishing it [i.e., negligence], a conditional privilege is not needed and should not now be held to apply. The conditional privilege should be confined to a situation where the court feels that it is appropriate to hold the publisher liable only in case he knew of the falsity or acted in reckless disregard of it [i.e., actual malice].

Restatement (Second) of Torts § 599 cmt. d. (1977).

Contrary to the determination of the majority that the conditional privilege of a private defendant speaking on

matters of public concern is defeated by a showing of negligence and therefore without effect, I would hold instead that where the plaintiff is a private figure and the statements fall within some recognized common law privilege, i.e., are in furtherance of some interest of social importance, the conditional privilege may apply to elevate the level of fault required to actual malice.[1] Indeed, the United States Supreme Court, acknowledging the varying degrees of constitutional value of certain forms speech, has observed that speech involving matters of public concern has greater constitutional value than speech concerning matters of purely private concern. *Dun Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 750, 105 S.Ct. 2939, 2940 (1985). Where a defendant makes a privileged statement about a private-figure plaintiff, but the statement relates to a matter of social importance, such speech should be afforded the heightened constitutional protection of a conditional privilege. In the instant case, I would agree with Superior Court and the trial court that the defamatory statement at issue touched upon a matter of social importance and was made on a "proper

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1. This Commonwealth has historically permitted some conditional privileges to be defeated upon a showing of actual malice. *See e.g. Dempsky v. Double*, 386 Pa. 542, 547, 126 A.2d 915, 917 (1956); *Biggans v. Foglietta*, 403 Pa. 510, 512, 170 A.2d 345, 346 (1961) (if the court determines that the alleged defamatory publication is privileged and there is no intrinsic or extrinsic evidence of malice, the court has a duty to direct a nonsuit or give binding instructions for the defendant); *Corabi*, 441 Pa. at 452, 273 A.2d at 909 ("[I]f the privileged occasion is but a qualified one and it be shown that defendant was actuated by malice, the defense of qualified privilege is vitiated."). Therefore, it would not be contrary to established precedent to require an actual malice standard for a private-figure plaintiff to overcome a conditional privilege.

occasion, from a proper motive in a proper manner and based upon reasonable and probable cause." *Baird*, 446 Pa. at 275, 285 A.2d at 171.

Thus, while I agree with the majority that the appropriate standard for a private-figure plaintiff is, generally, to prove that the defamatory matter was published with negligence, as the Restatement (Second) of Torts § 599 comment d suggests, I would leave the courts with the option of assessing the circumstances under which it is appropriate to grant a conditional privilege to elevate the level of proof that the plaintiff must overcome to actual malice. Such circumstances where a conditional privilege may apply would include situations in which there are private-figure plaintiffs and matters of social importance.[2]

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2. For additional situations in which the conditional privilege may apply to elevate the level of fault, *see* Restatement (Second) of Torts § 594 (Protection of the Publisher's Interest); § 595 (Protection of Interest of Recipient or a Third Person); § 596 (Common Interest); § 597 (Family Relationships); § 598 (Communication to One Who May Act in the Public Interest) (1977). *See also MacRae v. Afro-American Co.*, 172 F.Supp. 184, 188 (1959) ("Proper occasions, which give rise to a conditional privilege, are classified ... as follows: (1) situations in which some interest of the person who publishes the defamatory matter is involved, (2) situations in which some interest of the person to whom the matter is published or of some other third person is involved, and (3) situations in which a recognized interest of the public is involved.").

APPENDIX B — OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA FILED MARCH 21, 2005

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 1042 EDA 2004

AMERICAN FUTURE SYSTEMS, INC. D/B/A PROGRESSIVE BUSINESS PUBLICATIONS,

Appellant,

vs.

BETTER BUSINESS BUREAU OF EASTERN PENNSYLVANIA AND BETTER BUSINESS BUREAU OF METROPOLITAN WASHINGTON,

Appellees.

BEFORE: STEVENS, GANTMAN, AND KELLY, JJ.

OPINION BY GANTMAN, J.: Filed: March 21, 2005

Appellant, American Future Systems, Inc., d/b/a Progressive Business Publications ("PBP") asks us to determine whether the trial court's jury instructions and evidentiary rulings constituted error warranting the award of a new trial for defamation against Appellees, the Better

Appendix B

Business Bureaus of Eastern Pennsylvania and Metropolitan Washington, D.C. ("BBB"). PBP additionally asks whether the court erred when it denied PBP's motion for judgment as a matter of law ("JNOV"). We hold the court's jury instructions and evidentiary rulings were proper and conclude PBP was not entitled to JNOV. Accordingly, we affirm the judgment entered on the jury's verdict in favor of BBB.

The relevant facts and procedural history of this appeal are as follows. PBP is a publisher and telemarketer of numerous fast-read format newsletters. The newsletters contain business-related information for consumers in career areas such as sales, marketing, advertising, financial management, business management, human resources, and safety and regulatory compliance. PBP sells its newsletters through scripted telemarketing techniques. Telemarketers place calls to consumers at their places of employment during regular business hours, offering them "no-risk" trial subscriptions to newsletters. The consumers may review the first two issues free of charge. In the event consumers do not wish to purchase the newsletters, they need only write "cancel" on the first invoice. If a consumer agrees to try the free "no-risk" trial offer, the telemarketer is instructed to procure the consumer's date of birth (excluding year) for verification purposes.

PBP generally sends the first invoice for payment to the consumer who agreed to the trial offer. If the first invoice is not returned to PBP with "cancel" written upon it and no payment is immediately forthcoming, PBP sends the second invoice to the accounts receivable department of the solicited consumer's place of employment. Invoices are sent monthly.

Appendix B

The invoices request payment, do not state the cancellation policy, and do not contain PBP's phone number. PBP's policy is to terminate, without further obligation, any subscription for which a cancelled invoice is received within six months after the initial phone call. After six months of non-payment, however, past-due accounts are turned over to a collection agency. A typical annual subscription price is approximately $300.00. Ninety-two percent of the subscriptions are cancelled.

PBP employs approximately 500 telemarketers within 15 separate offices across several states. It telemarkets nationally and solicits 15,000 new subscriptions each week. PBP is headquartered in Malvern, PA, and is owned by Ed Satell, who has a 98% interest in the company. He testified that the company's annual gross revenues have risen every year and totaled $29 million in 2002.

In early 2001, Mr. Satell became aware BBB had published an unsatisfactory reliability report regarding PBP.[1] The reliability report stated, in pertinent part:

> While this company responds to customer complaints presented to it by this Bureau, this company has an unsatisfactory business

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1. The Council of Better Business Bureaus is comprised of hundreds of separate non-profit corporations nationwide that publish ratings of companies and help resolve consumer complaints. Prior to 2000, the Better Business Bureau Council affiliate serving the local area was BBB of Eastern PA. In October 2000, BBB of Metropolitan Washington, D.C., acquired and took over the operation of BBB of Eastern PA.

> performance record due to a pattern of customer complaints alleging billing for unordered merchandise. Some consumers have claimed that they cancelled subscriptions but their cancellations were not honored.

(BBB Reliability Report, March 2001, at 1). The second page of the report contained the following disclaimer:

> As a matter of policy, the Better Business Bureau does not endorse any product, service, or company. BBB reports generally cover a three-year reporting period, and are provided solely to assist you in exercising your own best judgment. Information contained in this report is believed to be reliable but not guaranteed as to accuracy. Reports are subject to change at any time.

(*Id.* at 2). Mr. Satell contested the report in correspondence sent to BBB, stating PBP tape-records its telemarketer's calls for training purposes and can disprove claims of unordered merchandise by confirming the birthdate of every consumer who has placed an order. Mr. Satell further stated the number of complaints BBB receives regarding PBP are infinitesimal when compared to the overall volume of PBP's orders. Mr. Satell sought a retraction of the unsatisfactory reliability report.

Thereafter, BBB issued the following updated reliability report regarding PBP:

> While this company responds to customer complaints presented to it by this Bureau, this

> company has an unsatisfactory business performance record due to a pattern of customer complaints alleging billing for unordered merchandise. Some consumers have claimed that they cancelled subscriptions but their cancellations were not honored. On March 16, 2001, [PBP] responded to the BBB concerning the company's unsatisfactory business performance report. The company sells its publications through telemarketing solicitations. It claims that it tape records telephone solicitations for quality control purposes. The company states that it obtains the ordering person's birthdate to verify the order at a later date. According to the correspondence, orders are confirmed by fax within 24 hours, giving the orderer an opportunity to respond. The company claims it has a liberal cancellation policy permitting the customer to cancel anytime within the first three months of the telephone order and receiving a refund on all unsent issues. New subscribers receive two free issues with the right to cancel according to the company. The company claims that its BBB complaint volume is negligible compared to its volume of business.

(BBB Reliability Report, April 2001, at 1). The updated report included the identical disclaimer contained in the earlier report.

Mr. Satell was dissatisfied with the content of the updated report. During the summer of 2001, at Mr. Satell's urging,

representatives of BBB met with him and several of his senior employees at the Malvern headquarters of PBP in an effort to resolve the unsatisfactory rating. When no resolution was reached, PBP filed a defamation action against BBB of Eastern PA, which included a claim for punitive damages. The complaint additionally alleged commercial disparagement and tortious interference with existing and prospective business relations at Counts II and III, respectively.

BBB filed an answer with new matter. In July 2002, the court permitted PBP to file an amended complaint, joining BBB of Metropolitan Washington, D.C., as successor in interest to BBB of Eastern PA. BBB filed preliminary objections to the amended complaint. In December 2002, the court sustained BBB's preliminary objections and dismissed Counts II and III of the amended complaint.

On June 2, 2003, BBB filed a motion for summary judgment on the remaining defamation claim. On July 2, 2003, PBP filed a cross-motion for summary judgment, contending BBB admitted all averments in PBP's amended complaint, due to BBB's failure to answer the amended complaint. On July 11, 2003, BBB filed an answer with new matter to the amended complaint. BBB's answer with new matter to the remaining defamation claim in the amended complaint was identical to its previous answer with new matter to the same defamation claim. The court denied the competing motions for summary judgment. It denied BBB's motion for summary judgment, because a jury question existed regarding whether the reliability reports were capable of defamatory meaning. It denied PBP's cross-motion for

summary judgment as moot, in light of BBB's July 11th answer with new matter to the amended complaint.

Pretrial, the court granted BBB's motion *in limine* to exclude evidence relating to the failing financial status of BBB of Eastern PA and the investigation into its operations conducted by the Council of Better Business Bureaus. The court also granted BBB's motion *in limine* to exclude certain documentary evidence relating to its ratings for other companies. Additionally, the court granted PBP's motion *in limine* to exclude evidence of consumer complaints filed prior to 1998 and evidence relating to a 1995 civil action brought by the U.S. Postal Service against PBP.

Trial of the matter took place in October 2003, and lasted seven days. PBP's chief witness was Mr. Satell. He testified, *inter alia*, it was impossible for a pattern of legitimate complaints for unordered merchandise to exist, because PBP's quality control measures assure that every order is authenticated. He further stated the number of BBB complaints represented less than one per cent of PBP's total orders. He averred BBB failed to retract its unsatisfactory reliability report despite his allegedly conclusive demonstration to BBB's representatives that the complaints of unordered merchandise were impossible and blatantly false. He asserted BBB published the allegedly defamatory reliability reports in an effort to pressure PBP to become a dues-paying BBB member.

During Mr. Satell's direct testimony, counsel for PBP identified and utilized correspondence Mr. Satell sent to BBB, claiming "there has never been an unfavorable outcome for

us in any judicial forum." (N.T. Trial, 10/8/03, at 50). On cross-examination, over PBP's objection, the court permitted counsel for BBB to inquire regarding the outcome of separate civil actions instituted by the United States Department of Justice and the state of North Carolina against PBP. Additionally, the court permitted BBB to introduce documentary evidence of 108 complaints it had received for unordered merchandise. The court also permitted BBB to present the testimony of three witnesses to rebut Mr. Satell's claim that it was impossible for consumers to receive unordered merchandise.

The court instructed the jury that BBB enjoyed a conditional privilege, because its publications represented matters of public concern. The court additionally instructed the jury that to overcome the conditional privilege, PBP was required to show that the statements were made with intentional knowledge of their falsity or reckless disregard with respect to their truth or falsity. PBP requested the court to instruct the jury that BBB bore the burden of proof to show its statements were true. The court denied the request and instructed the jury PBP bore the burden of proof to show the statements were defamatory. The jury determined the reliability reports were not defamatory.

PBP filed post-trial motions for JNOV and for a new trial. The motion for JNOV contained a paragraph alleging PBP was entitled to judgment due to BBB's failure to timely answer the amended complaint. However, the allegation was not included in PBP's supporting brief or argued before the court. Following argument, the court denied PBP's motions. The trial court entered judgment on the verdict on March 16, 2004. PBP filed a timely notice of appeal.

Appendix B

On appeal, PBP raises the following issues:

WHETHER [PBP] IS ENTITLED TO A NEW TRIAL WHERE THE [TRIAL] COURT IGNORED SUBSTANTIAL PRECEDENT IN ERRONEOUSLY INSTRUCTING THE JURY:

> THAT [PBP] WAS REQUIRED TO ESTABLISH THAT [BBB] ACTED WITH ACTUAL MALICE, RATHER THAN WITH NEGLIGENCE, TO DEFEAT THE CONDITIONAL PRIVILEGE;
>
> THAT [BBB WAS] ENTITLED TO A CONDITIONAL PRIVILEGE EVEN THOUGH THEY CONCEDED THAT THEY CONDUCTED NO INVESTIGATION INTO THE TRUTH OF THE STATEMENTS THEY PUBLISHED CONCERNING [PBP]; AND
>
> THAT [PBP] BORE THE BURDEN OF PROVING THAT [BBB'S] STATEMENTS WERE FALSE?

WHETHER [PBP] IS ENTITLED TO A NEW TRIAL WHERE THE [TRIAL] COURT MADE A NUMBER OF HIGHLY PREJUDICIAL AND IMPROPER EVIDENTIARY RULINGS BY:

Appendix B

ADMITTING IRRELEVANT EVIDENCE REGARDING A TWENTY YEAR OLD COURT OPINION IN A RACIAL DISCRIMINATION CASE AND A TEN YEAR OLD SETTLEMENT IN AN ACTION BROUGHT BY A STATE ATTORNEY GENERAL FOR IMPEACHMENT PURPOSES;

ADMITTING EVIDENCE OF HUNDREDS OF HEARSAY CUSTOMER COMPLAINTS;

IMPROPERLY PRECLUDING [PBP] FROM INTRODUCING EVIDENCE REGARDING [BBB'S] MALICE; AND

PERMITTING [BBB] TO CALL THREE SURPRISE WITNESSES AT TRIAL WHO WERE NOT IDENTIFIED IN DISCOVERY?

WHETHER [PBP] IS ENTITLED TO ENTRY OF JUDGMENT IN ITS FAVOR WHERE [BBB] INEXCUSABLY FAILED TO ANSWER THE COMPLAINT UNTIL AFTER THE CLOSE OF DISCOVERY?

(PBP's Brief at 3).

Appendix B

PBP first claims the court erred in charging the jury as follows:

> Now I have determined as a matter of law that the defendants were privileged to publish these. . .communications. However, a person who is privileged to publish...communications may not abuse this privilege. It is for you, the jury, to determine whether the defendants abused this privilege. And if you find that it did, you may return a verdict in favor of the plaintiff and against one or both defendants.
>
> The privilege I find applicable to this case is the conditional privilege available to consumer reporting agencies to issue fair and accurate reports of consumer complaints.
>
> Now, this privilege is abused, however, if the defendant published the false and defamatory communication intentionally, that is, with knowledge of its falsity or recklessly, that is, with disregard as to whether it was true or false.

(N.T., 10/14/03, at 17).

PBP argues the court erred in giving the above instruction in light of the court's determination, as a matter of law, that PBP was a "private figure" plaintiff. (PBP's Brief at 20). PBP asserts it was not required, under decisional precedent, to prove the statements were made "maliciously." (*Id.*) Instead, PBP contends the law merely required it to show

the statements were made "negligently." (*Id.*) Moreover, PBP insists the statements did not involve matters of public concern. Therefore, the court erred in instructing the jury that PBP bore the burden of proof to show the statements were false. Instead, the court should have instructed the jury BBB bore the burden of proof to show the statements were true. Thus, PBP concludes the court erred in denying its motion for a new trial based on the court's erroneous jury instructions. We disagree.

Our review of PBP's first issue implicates the following legal principles:

> This [C]ourt will not reverse a trial court's decision regarding the grant or refusal of a new trial absent an abuse of discretion or an error of law. Where an appellant claims that the trial court erred in denying a new trial due to an allegedly objectionable jury charge, a timely and specific objection must be made to preserve [this] claim[.]
>
> * * *
>
> In reviewing a claim regarding error with respect to a specific jury charge, we must view the charge in its entirety taking into consideration all the evidence of record and determine whether or not error was committed and, if so, whether that error was prejudicial to the complaining party.

Carpinet v. Mitchell, 853 A.2d 366, 371 (Pa.Super.2004) (quotation marks and internal citations omitted). "A trial court

has broad discretion in phrasing jury instructions, and may choose its own wording as long as the law is clearly, adequately and accurately presented to the jury for its consideration." *Vallone v. Creech*, 820 A.2d 760, 764 (Pa.Super.2003), *appeal denied*, 574 Pa. 755, 830 A.2d 976 (2003).

A publisher of a defamatory statement is not liable if the statement was made subject to a conditional privilege and the privilege was not abused. *Elia v. Erie Ins. Exchange*, 430 Pa.Super. 384, 634 A.2d 657, 660 (1993), *appeal denied*, 537 Pa. 662, 644 A.2d 1200 (1994). A conditional privilege arises when a recognized interest of the public is involved. *Id.* In *Banas v. Matthews Intern. Corp.*, 348 Pa.Super. 464, 502 A.2d 637 (1985), this Court stated:

> Appellant argues that its conditional privilege could be abused and therefore lost, only by a defamatory communication made with malice-not simply negligently, as the trial court charged the jury. This argument may be disposed of summarily.
>
> In *Rutt v. Bethlehems' Globe Publishing Co.*, 335 Pa.Super. 163, 484 A.2d 72 (1984), we stated:
>
> *Matus* [*v. Triangle Publications, Inc.*, 445 Pa. 384, 286 A.2d 357 (1971), *cert. denied*, 408 U.S. 930, 92 S.Ct. 2494, 33 L.Ed.2d 343 (1972)], . . . declare[s] quite unequivocally, that under Pennsylvania law, once the issue of conditional privilege is raised by a defendant who has been

> sued by a private figure for defamatory communications concerning matters which are not of public concern, the burden of proof of the plaintiff in order to establish abuse of the conditional privilege is "want of reasonable care and diligence to ascertain the truth" or more simply put, negligence. *Id.* 445 Pa. at 398, 286 A.2d at 365[.]

Id. at 638-39. The defamatory speech in *Banas* did not involve a matter of public concern. *Id.*

Speech on matters of public concern "is at the heart of the First Amendment's protection." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759, 105 S.Ct. 2939, 2945, 86 L.Ed.2d 593, 602 (1984). Whether speech addresses a matter of public concern must be determined by its content, form, and context, as evidenced by the entire record. *Id.* at 761, 105 S.Ct. at 2946, 86 L.Ed.2d at 603. A statement regarding the effectiveness of a consumer product addresses a matter of public concern. *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1056 (9th Cir.1990), *cert. denied*, 499 U.S. 961, 111 S.Ct. 1586, 113 L.Ed.2d 650 (1991).

A private figure plaintiff who seeks punitive damages in a defamation suit against a media defendant regarding statements touching upon a matter of public concern, must 1) show the defendant acted with actual malice and 2) prove the allegedly defamatory statements were, in fact, false. *Philadelphia Newspapers Inc. v. Hepps*, 475 U.S. 767, 774-78, 106 S.Ct. 1558, 1562-65, 89 L.Ed.2d 783, 791-93 (1986) (citing *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 94 S.Ct.

2997, 41 L.Ed.2d 789 (1974)). A statement is made with "actual malice," if it is made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S.Ct. 710, 725-26, 11 L.Ed.2d 686, 706 (1964).

Instantly, the statements at issue related to consumer complaints and, therefore, touched upon a matter of public concern. *See Unelko, supra.* Thus, BBB was entitled to a conditional privilege in its publication of the reports. *See Elia, supra.* Further, PBP was required to show more than mere negligence in the publication of the statements to defeat the conditional privilege enjoyed by BBB. *See Banas, supra; Rutt, supra.* PBP, which sought punitive damages, was required to show the statements were made with actual malice. *See Gertz, supra; Sullivan, supra.* Additionally, PBP was required to show the complaints of unordered merchandise were false. *See Philadelphia Newspapers, Inc., supra.* Therefore, the court's charge adequately and accurately explained the law to the jury and we see no error or abuse of discretion. *See Vallone, supra; Carpinet, supra.* Accordingly we dismiss PBP's first issue.

In its second issue, PBP challenges a number of allegedly erroneous evidentiary rulings. Specifically, PBP claims counsel for BBB was erroneously permitted to cross-examine Mr. Satell regarding allegedly irrelevant and prejudicial evidence of two civil suits filed against PBP's corporate alter-ego, American Future Systems, Inc. PBP further claims the documents detailing specific customer complaints to BBB were inadmissible hearsay. Additionally, PBP posits it should have been allowed to admit documents relating to the Council

of Better Business Bureaus' investigation into the allegedly inappropriate operation of BBB of Eastern PA, including documents relating to BBB's handling of complaints against other companies. Finally, PBP asserts the testimony of BBB's three rebuttal witnesses, constituted unfair surprise. Thus, PBP concludes the court erred in denying its motion for new trial on these grounds. We disagree.

"Absent a clear abuse of discretion by the trial court, appellate courts must not interfere with the trial court's authority to grant or deny a new trial." *Harman ex rel. Harman v. Borah*, 562 Pa. 455, 466, 756 A.2d 1116, 1121-22 (2000).

> In *Harman*, the Court. . .set forth an additional dual-pronged analysis for our appellate review of a trial court's determination to grant or deny[2] a new trial. First, the appellate court must examine the decision of the trial court to determine whether it agrees that a mistake was, or was not made. If the appellate court discerns that a mistake was made at trial, it must analyze whether the trial court abused its discretion in ruling on the motion for a new trial.
>
> > 2. The court specifically held that a review of a denial of a new trial requires the same analysis as a review of a grant.
>
> Our Supreme Court held in *Harman* that in applying the appropriate standard of appellate review of an order denying a new trial [ ], if the

> alleged mistake at trial involved a discretionary act, the appellate court must review for an abuse of discretion. The Court reiterated that a trial court abuses its discretion by rendering a judgment that is manifestly unreasonable, arbitrary or capricious, or has failed to apply the law, or was motivated by partiality, prejudice, bias or ill will. If the alleged mistake involved an error of law, the appellate court must scrutinize for legal error. If the appellate court agrees with the trial court's determination that there were no prejudicial mistakes at trial, then a decision by the trial court to deny a new trial must stand and we need not reach the second prong of the analysis.
>
> Furthermore, it is axiomatic that we must consider, viewing the evidence in the light most favorable to the verdict winner, whether a new trial would produce a different verdict. Moreover, we consistently have held that if there is any support in the record for the trial court's decision to deny a new trial, that decision must be affirmed.

Bey v. Sacks, 789 A.2d 232, 236-37 (Pa.Super.2001) (internal citations omitted).

Admission of evidence is within the sound discretion of the trial court and we review the trial court's determinations regarding the admissibility of evidence for an abuse of discretion. *Smalls v. Pittsburgh-Corning Corp.*, 843 A.2d 410, 413 (Pa.Super.2004), *appeal denied*, 579 Pa. 704, 857 A.2d 680 (2004). To constitute reversible error, an evidentiary

ruling must not only be erroneous, but also harmful or prejudicial to the complaining party. *Ettinger v. Triangle-Pacific Corp.*, 799 A.2d 95, 110 (Pa.Super.2002), *appeal denied*, 572 Pa. 742, 815 A.2d 1042 (2003). For evidence to be admissible, it must be competent and relevant. *Ratti v. Wheeling Pittsburgh Steel Corp.*, 758 A.2d 695, 707 (Pa.Super.2000), *appeal denied*, 567 Pa. 715, 785 A.2d 90 (2001). Evidence is competent if it is material to the issue to be determined at trial. *Id.* Evidence is relevant if it tends to prove or disprove a material fact. *Id.* at 707-08. Relevant evidence is admissible if its probative value outweighs its prejudicial impact. *Id.* at 708. The trial court's rulings regarding the relevancy of evidence will not be overturned absent an abuse of discretion. *Romeo v. Manuel*, 703 A.2d 530, 532 (Pa.Super.1997).

The character of a witness for truthfulness may not be attacked or supported by cross-examination or extrinsic evidence concerning specific instances of a witness' conduct. Pa.R.E. 608. However, the credibility of a witness may be impeached by any evidence relevant to that issue. Pa.R.E. 607.

Hearsay is a statement, other than a statement made by the declarant while testifying under oath, which is offered for the truth of the matter asserted. Pa.R.E. 801(c). Generally, hearsay is inadmissible at trial. Pa.R.E. 802. However, where an out-of-court statement is not admitted for the purpose of proving the truth of what was said, the hearsay rule does not bar admission of that statement. *See, e.g., Spotts v. Reidell*, 345 Pa.Super. 37, 497 A.2d 630 (1985); *Bachman v. Artinger*, 285 Pa.Super. 57, 426 A.2d 702 (1981). "Testimony as to an

out of court statement, written or oral, is not hearsay if offered to prove, not that the content of the statement was true, but that the statement was made." *Id.* at 705. "The hearsay rule does not apply to all statements made to or overheard by a witness, but only those statements which are offered as proof of the truth of what is said. Thus, a witness may testify to a statement made to him when one of the issues involved is whether or not the statement was, in fact, made." *Commonwealth v. Wright*, 455 Pa. 480, 485, 317 A.2d 271, 273 (1974).

Pennsylvania Rule of Civil Procedure 4019(i) provides:

> **Rule 4019. Sanctions**
>
> * * *
>
> (i) A witness whose identity has not been revealed as provided in this chapter shall not be permitted to testify on behalf of the defaulting party at the trial of the action. However, if the failure to disclose the identity of the witness is the result of extenuating circumstances beyond the control of the defaulting party, the court may grant a continuance or other appropriate relief.

Pa.R.C.P. 4019(i). "The purpose of the discovery rules is to prevent surprise and unfairness and to allow a trial on the merits." *Clark v. Hoerner*, 362 Pa.Super. 588, 525 A.2d 377, 382 (1987). "The rules must be interpreted to prevent surprise and unfairness and not as devices for excluding relevant rebuttal evidence." *Id.* "Where there is ambiguity, the rule

will be construed...to secure a just determination of the action. This will more likely be achieved by receiving relevant evidence than by excluding it." *Id.*

> Generally the admission of rebuttal evidence is a matter within the sound discretion of the trial court. Rebuttal evidence is proper where it is offered to discredit testimony of an opponent's witness. Our Supreme Court has previously opined "where the evidence goes to the impeachment of his opponent's witness, it is admissible as a matter of right." Furthermore, in order to constitute proper impeachment evidence, the rebuttal witness' version of the facts must differ from that of the witness being impeached.

Ratti, supra at 708-09 (internal citations omitted).

Instantly, Mr. Satell sent correspondence to BBB containing the averment: "There has never been an unfavorable outcome for us in any judicial forum." (N.T. Trial, 10/8/03, at 50). The correspondence was marked for identification and portions of it were projected upon a screen for the jury's review. On cross-examination, BBB attempted to impeach the credibility of the averment by inquiring into the outcome of two civil suits. Mr. Satell responded he was "very proud of the outcome" in the action initiated by the United States Department of Justice. (*Id.* at 112). With respect to the outcome in the action initiated by the state of North Carolina, Mr. Satell explained, "they had language in there, in the settlement, that was very, very complimentary to us." (N.T., 10/09/03, at 26).

Appendix B

The impeachment evidence introduced was relevant, because it concerned Mr. Satell's credibility. *See* Pa.R.E. 607, *supra; Ratti, supra.* The probative value of the evidence was not outweighed by its prejudicial impact, because Mr. Satell was given the opportunity to explain his favorable opinion of the resolutions reached. *See id.* Thus, we see no reversible error in the court's decision to permit this avenue of impeachment of Mr. Satell on cross-examination. *See Ettinger, supra; Ratti, supra;* Pa.R.E. 607, *supra.*

Additionally, BBB introduced documentary evidence of 108 consumer complaints it had received, alleging billing for unordered merchandise. PBP lodged an objection on the basis of hearsay. BBB responded it was not offering the documents for the truth of the matter asserted; *i.e.*, that PBP billed for unordered merchandise. Instead, BBB offered the evidence to show in fact it had received complaints alleging same. The court gave the jury a limiting instruction regarding its consideration of the reports. Under these circumstances, the court did not err in admitting the evidence. *See Spotts, supra; Wright, supra.*

Further, the court granted BBB's motion *in limine* to preclude introduction of documents relating to the Council of Better Business Bureaus' investigation into the allegedly inappropriate operation of BBB of Eastern PA, including documents relating to BBB's handling of complaints against other companies. Chronologically, the BBB of Metropolitan Washington, D.C., acquired the BBB of Eastern PA, in October 2000. The reliability reports published in March and April of 2001, which PBP alleged were defamatory, were issued by BBB of Metropolitan Washington, D.C., at a time

when BBB of Eastern PA was defunct. Thus, we fail to see the relevance of the proposed evidence to the issues raised at trial and determine the court properly precluded the proposed evidence. *See Smalls, supra; Ettinger, supra; Ratti, supra.*

Lastly, a major thrust of Mr. Satell's testimony was the impossibility that PBP billed for unordered merchandise, due to its strict quality control procedures. In response, BBB presented the testimony of three rebuttal witnesses whose names had not been previously provided in discovery. The witnesses were identified on "the eve of trial." (PBP's Brief at 40). The witnesses testified that they had received unordered merchandise. Given the competing interests of preventing unfair surprise and permitting relevant rebuttal evidence, we see no reversible error. *See Ratti, supra; Clark, supra.* Instead, the court properly balanced these interests to achieve a just determination of the action. *See id.* Based on the foregoing, we reject PBP's assertion of entitlement to a new trial due to allegedly erroneous and prejudicial evidentiary rulings. *See Smalls, supra; Ettinger, supra.*

In its final issue, PBP alleges BBB's failure to answer the amended complaint constituted an admission of the averments contained therein, warranting the grant of summary judgment in PBP's favor. PBP asserts the court erred in denying its cross-motion for summary judgment and concludes, on that basis, the court erred in dismissing its motion for JNOV as well. We disagree.

Appendix B

Our standard of review of a trial court's denial of a motion for JNOV is as follows:

> A JNOV can be entered upon two bases: (1) where the movant is entitled to judgment as a matter of law; and/or, (2) the evidence was such that no two reasonable minds could disagree that the verdict should have been rendered for the movant. When reviewing a trial court's denial of a motion for JNOV, we must consider all of the evidence admitted to decide if there was sufficient competent evidence to sustain the verdict. In so doing, we must also view this evidence in the light most favorable to the verdict winner, giving the victorious party the benefit of every reasonable inference arising from the evidence and rejecting all unfavorable testimony and inference. Concerning any questions of law, our scope of review is plenary. Concerning questions of credibility and weight accorded the evidence at trial, we will not substitute our judgment for that of the finder of fact. If any basis exists upon which the jury could have properly made its award, then we must affirm the trial court's denial of the motion for JNOV. A JNOV should be entered only in a clear case.

Buckley v. Exodus Transit & Storage Corp., 744 A.2d 298, 305 (Pa.Super.1999) (internal citations omitted).

Appendix B

Our resolution of the substantive issue underlying PBP's claim of entitlement to JNOV requires review of precedent interpreting Pa.R.C.P. 1026:

> Although Rule 1026(a) of the Pennsylvania Rules of Civil Procedure states that all pleadings subsequent to the complaint must be filed within 20 days after service of the preceding pleading, this Rule has been interpreted as permissive rather than mandatory. It is left to the sound discretion of the trial court to permit a late filing of a pleading where the opposing party will not be prejudiced and justice so requires.

Gale v. Mercy Catholic Medical Center Eastwick, Inc., Fitzgerald Mercy Div., 698 A.2d 647, 649 (Pa.Super.1997), *appeal denied*, 552 Pa. 696, 716 A.2d 1249 (1998). When a party moves to strike an untimely pleading, the responding party must demonstrate just cause for the delay. *Id.* (citing *Peters Creek Sanitary Authority v. Welch*, 545 Pa. 309, 681 A.2d 167 (1996)). Thereafter, the moving party is required to show prejudice by virtue of the late pleading. *Gale*, *supra* at 650.

Nevertheless, only those issues raised in a post-trial motion which are briefed or argued before the court hearing the motion will be considered preserved for appellate review. *Commonwealth v. Manigault*, 501 Pa. 506, 509, 462 A.2d 239, 241 (1983) (citing *Commonwealth v. Williams*, 476 Pa. 557, 383 A.2d 503 (1978)). *See Schneider v. Albert Einstein Medical Center*, 257 Pa.Super. 348, 390 A.2d 1271 (1978) (stating issue waived when raised in post-trial motions but

not briefed or argued before trial court). *See also Berman v. Radnor Rolls*, 374 Pa.Super. 118, 542 A.2d 525, 529 (1988) (same).

Instantly, PBP's post-trial motion for JNOV contained one paragraph which alleged the court erred in failing to grant summary judgment in PBP's favor, on the basis that BBB had not filed an answer to PBP's amended complaint. However, PBP did not brief or argue the issue before the trial court. In its Rule 1925(a) opinion, the court noted that it was considering the issue for the first time. The court concluded PBP was not prejudiced by the late filing, where BBB's answer with new matter to the amended complaint was identical to and simply reiterated BBB's previous answer with new matter to the same defamation claim. The record supports the court's conclusion in this regard. *See Gale, supra.* Thus, we see no abuse of discretion and dismiss PBP's final issue. *See Buckley, supra.*

Based on the foregoing, we hold the court's jury instructions and evidentiary rulings were proper and conclude PBP was not entitled to JNOV. Accordingly, we affirm the judgment entered on the jury's verdict in favor of BBB.

Judgment affirmed.

APPENDIX C — OPINION OF THE PHILADELPHIA COURT OF COMMON PLEAS, FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, CIVIL TRIAL DIVISION DATED MAY 5, 2004

PHILADELPHIA COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

NOVEMBER TERM 2001

NO. 00520

1042 EDA 2004

AMERICAN FUTURE SYSTEMS, INC., d/b/a PROGRESSIVE BUSINESS PUBLICATIONS,

Appellant

vs.

BETTER BUSINESS BUREAU OF EASTERN PENNSYLVANIA, Et Al.

Appellee

OPINION

BY: HONORABLE SHELDON C. JELIN

The plaintiff-appellant, American Future Systems, Inc. d/b/a Progressive Business Publications, brought this action

against Defendants, Better Business Bureau of Eastern Pennsylvania, and Better Business Bureau of Metropolitan Washington, to recover damages for alleged defamation.

This case was tried before a jury and a verdict was recorded on October 14, 2003 in favor of Defendants.

On October 24, 2003, Plaintiff filed a motion for post trial relief. On March 4, 2004, this Court denied Plaintiff's post trial motions.

On March 16, 2004, Judgment was entered on the verdict in favor of Defendants and against Plaintiff. Plaintiff timely filed its Notice of Appeal on March 25, 2004.

In its Statement of Matters Complained of on Appeal, Plaintiff contends: the court erred by denying Plaintiff's motion for judgment notwithstanding the verdict; the court erred by denying Plaintiff's request for a new trial; the court failed to provide the jury with an instruction regarding burden of proof; the court erred by admitting highly prejudicial and irrelevant evidence; the court erred by admitting hearsay evidence; the court erred by permitting the surprise testimony of witnesses; and the court erred by precluding the admission of highly probative evidence.

Plaintiff contends this Court erred by denying Plaintiff's motion for judgment notwithstanding the verdict because Defendants admitted that they did not investigate the statements at issue in this matter; and Defendants failed to answer the Plaintiff's Amended Complaint until after the close of discovery.

Appendix C

Judgment notwithstanding the verdict will only be granted where the moving party demonstrates that he is entitled to judgment as a matter of law or the evidence is insufficient to sustain the verdict. *Hohns v. Gain,* 806 A.2d 16, 2002 Pa. Super. 256 (2002) (citation omitted).

The allegedly defamatory statement at issue is:

> "While this company responds to customer complaints presented to it by this Bureau, this company has an unsatisfactory business performance record due to a pattern of customer complaints alleging billing for unordered merchandise. Some consumers have claimed that they cancelled subscriptions but their cancellations were not honored."

Plaintiff contends that Defendants' had a duty to investigate their assertions. This Court found that Defendants were merely stating an opinion and therefore had no duty to investigate. *See: Green v. Mizner*, 692 A.2d 169 (Pa. Super. 1997).

Further, Defendants presented live, independent witness testimony at trial who testified that the complaints were in fact true. Also, it was Plaintiff's burden to prove that the alleged defamatory statement was false since the statement bears on a matter of public concern. *See: Lewis v. Philadelphia Newspapers, Inc.*, 833 A.2d 185, 190 (Pa. Super. 2003). Plaintiff did not present such evidence. Accordingly, this Court properly denied Plaintiff's Motion for Judgment notwithstanding the verdict.

Appendix C

Plaintiff contends because Defendants failed to answer the Plaintiff's Amended Complaint until after the close of discovery the averments should have been admitted.[1] Plaintiff filed its Amended Complaint on July 22, 2002. Defendants filed their Answer and New Matter on July 11, 2003. Plaintiff filed preliminary objections to strike Defendants' Answer as untimely on July 31, 2003. The Honorable Mary D. Colins overruled Plaintiff's objections on September 8, 2003.

Defendants were under the false impression that they had not been properly served with the Amended Complaint and therefore, did not file an Answer. On July 2, 2003, Plaintiff filed a motion for summary judgment[2] on the basis that Defendants never filed an answer and therefore admitted all averments. Upon receipt of said motion, Defendants immediately reviewed the service of the amended complaint and fearing the possibility it may have been properly served filed their Answer on July 11, 2003. Thereby, making Plaintiff's Motion for Summary Judgment moot. Plaintiff filed preliminary objections to Defendants' Answer.

"It is left to the sound discretion of the trial court 'to permit a late filing of a pleading where the opposing party will not be prejudiced and justice so requires'." *Gale v. Mercy Catholic Medical Center Eastwick, Inc., Fitzgerald Mercy*

---

1. This issue is before this Court for the first time. Although it was included in Defendant's post trial motion it was neither briefed nor argued. Further, if a motion in limine had been filed, it was not before this Court.

2. Technically Plaintiff filed a cross-motion in response to Defendant's motion for summary judgment.

Div., 698 A.2d 647 (Pa. Super. 1997) (quoting *Ambrose v. Cross Creek Condominiums*, 412 Pa. Super. 1, 10, 602 A.2d 864, 868 (1992)). As Defendants' Answer and New Matter filed on July 11, 2003 contained the identical affirmative defenses and responses as the Answer and New Matter filed April 12, 2002, the court properly overruled Plaintiff's preliminary objections. Accordingly, this Court could not grant judgment notwithstanding the verdict on that basis.

Plaintiff contends this Court erred by denying Plaintiff's request for a new trial because this Court erroneously ruled and instructed the jury that a conditional privilege applied; and instructed the jury that the Plaintiff had to prove malice to overcome the privilege.

"It is well settled that the grant of a new trial is a matter within the sound discretion of the trial court." *Monschein v. Phifer*, 771 A.2d 18, 2001 Pa. Super. 80 (2001) (citation omitted). "A trial court may only grant a new trial when the jury's verdict is so contrary to the evidence that it 'shocks one's sense of justice." *Id.* This Court could not make such a finding in this case.

Defendant contends this Court erroneously ruled and instructed the jury that a conditional privilege applied. "Whether a communication is conditionally privileged is a question for the court and whether that privilege is abused is a question for the jury." *Bergerstock v. Washington Greene Community Action Corp.*, 397 Pa. Super. 403, 580 A.2d 361 (1990) (citation omitted). "'A publication is conditionally privileged if the publisher reasonably believes that the recipient shares a common interest in the subject matter and is entitled to know . . . .'"

Appendix C

In the instant case the Defendants are consumer reporting agencies. Clearly, the recipients share a common interest in the subject matter and are entitled to know. *See also*: *Elia v. Erie Insurance Exchange*, 430 Pa. Super. 384, 634 A.2d 657 (1993). Hence, this Court properly ruled that Defendants are entitled to a conditional privilege.

Plaintiff contends this Court's instruction on conditional privilege was in error. Specifically, Plaintiff contends conditional privilege is abused when a defendant acts with negligence, whereas, this Court instructed the jury that this privilege is abused when a defendant acts with malice.

The *Restatement (Second) Torts §600* states, in pertinent part: "[o]ne who upon occasion giving rise to a conditional privilege publishes false and defamatory matter concerning another abuses the privilege if he (a) knows the matter to be false, or (b) acts in reckless disregard as to its truth or falsity." *Id.*

The *Restatement (Second) Torts 600*, comment b, states that to include mere negligence as sufficient to amount to abuse of a conditional privilege makes the policy upon which conditional privilege is based, no longer applicable. *Id.* Further, the *Pennsylvania Suggested Standard Civil Jury Instructions*, subcommittee note 2, states in pertinent part: because "a conditional privilege is abused and will not apply upon proof that the defendant acted negligently, . . . , the entire protection afforded by the traditional conditional privileges has been vitiated." *Id.* (citations omitted)

Appendix C

After a full discussion at the charging conference, this Court instructed on conditional privilege. To instruct on this privilege and include the negligence standard would be an act in futility. This Court followed the theory set forth in Restatement (Second) Torts, 600, and gave, verbatim, the charge suggested in Pa. Suggested Standard Jury Instruction 13.09.

Although many courts have chosen not to follow section 600 and consider mere negligence an abuse of conditional privilege, *See*: *Baroerstock v. Washington Greene Community Action Corp.*, 397 Pa. Super. 403, 580 A.2d 361 (1990); and *Greene v. Mizner*, 692 A.2d 169 (Pa. Super. 1997), following the United States Supreme Court holding in *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323; other courts have continued to omit the negligence standard in abuse of conditional privilege cases. *See*: *Berg v. Consolidated Freightways, Inc.*, 421 A.2d 831, 200 Pa. Super. 495 (1980), and *Doman v. Rosner*, 246 Pa. Super. 616, 371 A.2d 1002 (1977).

This Court chose to omit negligence from its abuse of privilege charge and instructed the jury in accordance with *Pennsylvania Suggested Standard Jury Instruction 13.09* which states in pertinent part:

"I have determined, as a matter of law, that the defendant was privileged to publish false and defamatory communications. However, a person who is privileged to publish false and defamatory communications may not abuse this privilege. It is for you, the jury, to determine whether the defendant abused [its] privilege and if you find that [it] did, you may return a verdict in favor of the plaintiff and against the defendant."

Appendix C

"The privilege I find applicable to [this case] is [state privilege] . . . ."

"This privilege is abused, however, if the defendant [published] the false and defamatory communication intentionally, that is, with knowledge of its falsity, or recklessly, that is, with disregard as to whether it was true or false." *Id.*

This Court instructed the jury per 13.09 and inserted the following statement that was agreed to by both attorneys: "the privilege I find applicable to this case is the conditional privilege available to consumer reporting agencies to issue fair and accurate reports of the consumer complaints." *See*: *N.T., October 14, 2003*, p. 17.

Notwithstanding the above discussion, "[p]ursuant to Pennsylvania law, truth is an absolute defense." *Simms v. Exetir Architectural Products, Inc.*, 916 F. Supp. 432 (M.D. Pa. 1996). The defamatory statements that Plaintiff is relying on are statements published in a Better Business Bureau Company (BBB) Report. The report states that Plaintiff "has an unsatisfactory business performance record due to a pattern of customer complaints alleging billing for unordered merchandise."

Defendants presented 400 complaints they received about Plaintiff. *See: Defendants' Trial Exhibit D-37 a.1 through D-375.18.* In addition, Edward Satell, the owner of American Future Systems, Plaintiff, testified regarding complaints he personally received. *N.T., October 8, 2003, pgs. 92-109.* Defendants presented witnesses who testified

they wrote letters of complaint to Defendants about Plaintiff, and the complaints had merit. Based on many customer complaints, there is truth to the statements published by Defendants regarding Plaintiff's unsatisfactory business performance.

This Court notes that the reliability report published by Defendants also contained a response by Plaintiff, as well as a disclaimer regarding the accuracy of the complaints.

Assuming, arguendo, that Plaintiff is correct in all of the above assertions, Plaintiff has not proven that it sustained any damages.

Mr. Satell testified that in fiscal year 2000, Plaintiff grossed four million dollars over what had been anticipated. In fiscal year 2001, Mr. Satell testified, Plaintiff had a record year in terms of revenue. He continued to testify that Plaintiff had a record year every year. *N.T., October 8, 2003, pg. 45.* Further, Mr. Satell testified that the report had not affected Plaintiff from participating in its charitable activities, nor prevented Mr. Satell from sitting on any board on which he had previously served. *N.T., p. 46.* The fact that Plaintiff believed its reputation in the community had been damaged has no probative value whatsoever. Essentially it is no more proof than proof of hurt feelings, which is not compensable. *See: Rybas v. Wapner*, 311 Pa. Super. 50, 457 A.2d 108 (1983). Hence, Plaintiff is not entitled to a new trial.

Plaintiff contends this Court failed to provide the jury with an instruction regarding the Defendants' burden of proving the truth of the defamatory statements.

Appendix C

"A trial court has wide latitude in charging the jury and the court may use any particular language provided that the language used adequately and fully conveys to the jury the law applicable to the facts of the case." *Hutchison v. ex rel. Mutchison v. Luddy*, 763 A.2d 826, 2000 Pa. Super. 316 (2000) (citation omitted). In the instant case, although this Court did not instruct the jury per Plaintiff's requested proposal, it did instruct the jury regarding whether the statement was "substantially true" per standard jury instruction 13.08 and in the damages phase by referring to "defendants' unsuccessful assertion of the substantial truth of the defamatory communication." *N.T., October 8, 2003, pgs. 14, 20.*

Further, as stated above, because the statement in question bears on a matter of public concern, the plaintiff is required to prove that the alleged defamatory statement is, in fact false. *See*: *Lewis*, *supra.* Hence, this Court properly instructed the jury.

Plaintiff contends this Court erred by admitting highly prejudicial and irrelevant evidence about the Plaintiff from 1983 and 1991, specifically the 1983 opinion from the U.S. Eastern District Court relating to credit policies, and the 1991 settlement agreement between Plaintiff and the state of North Carolina.

While Plaintiff is correct that a motion in limine to preclude information about Plaintiff prior to 1998 was argued and granted, said ruling did not prevent Defendants from cross-examining on issues raised by Plaintiff's own witness. During the direct testimony of Mr. Satell, Plaintiff's counsel

showed a letter to the jury which stated: "[t]here has never been an unfavorable outcome for us in any judicial forum." *Plaintiff's exhibit 23; N.T., October 8, 2003, pg. 50.* Knowing that to be false, Defendants were permitted to cross-examine Mr. Satell regarding cases wherein there had been unfavorable outcomes in judicial forums. *See: Steinhouse v. Herman Miller, Inc.*, 443 Pa. Super. 395, 661 A.2d 1379 (1995).

This Court notes that Mr. Satell specifically testified that he was "very proud of the outcome of that case," *N.T., pg. 112*, referring to the U.S. District Court case; and "they had language in there, in the settlement, that was very, very complimentary to us," *N.T., October 9, 2003, pg. 26*, referring to the settlement with the state of North Carolina. Plaintiff, himself, admitting this evidence was in no way prejudicial to Plaintiff.

Further, this Court notes that Mr. Satell had to be cautioned throughout his cross-examination to refrain from raising extraneous issues. Specifically, while at sidebar, this Court admonished Plaintiff's counsel and stated: "your client is opening up the door to all of this by his answers to all of these questions. [H]e's volunteering a lot of information, which unfortunately opens the door to other questions, he's expounding on it, which leads to other questions." *N.T., pg. 32.* This further illustrates that Mr. Satell's own testimony resulted in the admission of the testimony that Plaintiff now contests.

Plaintiff contends this Court erred by admitting prejudicial hearsay evidence, specifically, the consumer complaints received by Defendants.

Appendix C

"Hearsay is an out-of-court statement offered to prove the truth of the matter asserted." *Commonwealth v. Cassidy*, 315 Pa. Super. 429, 462 A.2d 270 (1983) (citations omitted). "When an extra-judicial statement is offered for a purpose apart from proving the truth of its contents, it is not hearsay and is not excluded under the hearsay rule." *Id.*

In the instant case, the complaints were not offered to prove the truth of the matter asserted, but rather to prove Defendants did in fact receive complaints regarding Plaintiff's billing practices. The statement at issue is Plaintiff "has an unsatisfactory business performance record due to a pattern of customer complaints. . . ." Defendants were required to establish that they had received complaints and the basis of the complaints. Evidence to support this was relevant and therefore, admissible.

Plaintiff contends this Court erred by permitting surprise testimony of witnesses not identified during discovery and not disclosed until the eve of trial. The witnesses at issue, Lonnie Parks, Shanon Ayers, and Jennifer Nunan, were offered as rebuttal witnesses. Plaintiff, in its case in chief, presented testimony that none of the complaints had merit. Defendants presented the above witnesses to rebut Plaintiff's assertions and to prove the complaints did have merit.

"[I]t is entirely proper for a rebuttal witness to testify about facts which discredit an opponent's witness's opinions." *Mitchell v. Gravely Intern, Inc.*, 698 A.2d 618 (Pa. Super. 1997) (citation omitted). As in the cited case, Plaintiff argues the testimony should not have been admitted because they were "surprise witnesses". "Having found [the

testimony] was properly offered in rebuttal, however, we cannot conclude that the surprise to [Plaintiff] by [their] appearance warrants a new trial. *See Clark v. Hoerner*, 362 Pa. Super. 588, 599, 525 A.2d 377, 382 (1987) (the [discovery] rules must be interpreted to prevent surprise and unfairness and not as devices for excluding relevant, rebuttal evidence'.)." *Id.* At FN2. Accordingly, this Court properly admitted the testimony.

Plaintiff contends this Court erred by precluding the admission of highly probative evidence. Specifically, Plaintiff sought to introduce evidence relating to an investigation by the Council of Better Business Bureaus (CBBB) regarding the practices of the Better Business Bureau of Eastern Pennsylvania; and the number and type of complaints received by the Defendants about other companies.

"The trial judge has broad discretion regarding the admission of potentially misleading or confusing evidence. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or confusion." *Sprague v. Walter*, 441 Pa. Super. 1, 656 A.2d 890 (1995) (citations omitted).

In the instant case, such evidence is completely extraneous and irrelevant, highly prejudicial and confusing to the jury. Hence, this Court properly precluded this evidence.

For all of the above reasons, judgment should be affirmed.

BY THE COURT:

s/ Sheldon C. Jelin
SHELDON C. JELIN, J.

Dated: May 5, 2004

No. 07-285

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

AMERICAN FUTURE SYSTEMS, INC. d/b/a
PROGRESSIVE BUSINESS PUBLICATIONS,
Petitioner,

v.

BETTER BUSINESS BUREAU OF EASTERN PENNSYLVANIA
and BETTER BUSINESS BUREAU OF
METROPOLITAN WASHINGTON,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Supreme Court of Pennsylvania properly sustained the judgment entered on a jury verdict in favor of defendants-respondents, where

(a) the trial court held, in a ruling not disturbed on appeal, that the alleged defamatory statements were true and that petitioner failed to introduce evidence of falsity;

(b) the trial court held, in a ruling not disturbed on appeal, that the alleged defamation was in any event a statement of opinion;

(c) the trial court held, in a ruling not disturbed on appeal, that petitioner failed to prove any actual damages;

(d) to recover exemplary or punitive damages, petitioner was required to prove *New York Times* "malice," precisely the legal standard on which the jury was instructed; and

(e) even as to compensatory damages, the jury was properly instructed under the *New York Times* "malice" standard, because petitioner is a limited-purpose public figure.

CORPORATE DISCLOSURE STATEMENT

The Better Business Bureau of Metropolitan Washington owns 100% of the assets of respondent Better Business Bureau of Eastern Pennsylvania. Respondent Better Business Bureau of Metropolitan Washington has no parent corporation. No publicly held corporation owns 10% or more of the stock of the Better Business Bureau of Metropolitan Washington.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	2
I. THE PARTIES AND HISTORY OF THE DISPUTE	2
II. THE PROCEEDINGS BELOW	7
ARGUMENT	11
I. PETITIONER FAILED TO MEET ITS BURDEN OF PROOF ON THE ESSENTIAL ELEMENTS OF ITS DEFAMATION CLAIM	12
II. BECAUSE THE SPEECH AT ISSUE INVOLVED A MATTER OF PUBLIC CONCERN, PETITIONER'S PUNITIVE DAMAGES CLAIM REQUIRED PROOF OF ACTUAL MALICE REGARDLESS OF PETITIONER'S STATUS	14
III. THE SUPREME COURT OF PENNSYLVANIA CORRECTLY HELD THAT PETITIONER IS A LIMITED-PURPOSE PUBLIC FIGURE	16
CONCLUSION	20

TABLE OF AUTHORITIES

CASES Page

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) 16
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 12, 14, 15, 16, 17, 20
Hutchinson v. Proxmire, 443 U.S. 111 (1979) 18
Lewis v. Philadelphia Newspapers, Inc., 833 A.2d 185 (Pa. Super. Ct. 2003) 12
National Foundation of Cancer Research (NFCR) v. Council of Better Business Bureaus, 705 F.2d 98 (4th Cir. 1983) 10
New York Times Co. v. Sullivan, 376 U.S. 254 (1976) 12, 14
Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) 12
Synygy, Inc. v. Scott-Levin, Inc., 51 F. Supp. 2d 570 (E.D. Pa. 1999) 13-14
U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914 (3d Cir. 1990) 16
Walker v. Grand Central Sanitation, Inc., 430 Pa. Super. 236, 634 A.2d 237 (1993) .. 14
Wolston v. Reader's Digest Assoc., Inc., 443 U.S. 157 (1979) 18

STATUTES

42 Pa. Cons. Stat. § 8343 ..... 12, 13
Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 1601 *et seq.* (1994) 19
Telephone Consumer Protection Act, 47 U.S.C. § 227 (1991) 19

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES Page

Restatement (Second) of Torts § 600 8

In the Supreme Court of the United States

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AMERICAN FUTURE SYSTEMS, INC. d/b/a
PROGRESSIVE BUSINESS PUBLICATIONS,
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v.

BETTER BUSINESS BUREAU OF EASTERN PENNSYLVANIA
and BETTER BUSINESS BUREAU OF
METROPOLITAN WASHINGTON,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Better Business Bureau of Eastern Pennsylvania and Better Business Bureau of Metropolitan Washington ("Better Business Bureaus") respectfully submit this brief in opposition to the petition for a writ of certiorari in this case. [1]

[1] The Better Business Bureau of Metropolitan Washington acquired the assets of the Better Business Bureau of Eastern Pennsylvania in October 2000. Both were named as defendants in this case. We refer to them collectively as the "Better Business Bureaus" or "Bureaus."

STATEMENT OF THE CASE

I. THE PARTIES AND HISTORY OF THE DISPUTE

It is undisputed that the Better Business Bureaus serve an important public purpose. The Better Business Bureaus are non-profit corporations formed to facilitate and promote fair, ethical, and consumer-friendly marketplace conduct. Among other services, the Better Business Bureaus provide a means by which consumers can research whether businesses have been the subject of consumer complaints filed with the Bureaus. They perform this function by receiving, collecting, and reporting consumer complaints submitted about the companies within their regions. In particular, the Bureaus issue "Reliability Reports" on such companies, describing the kind and volume of complaints received and assigning, in the opinion of the Bureaus, "satisfactory" or "unsatisfactory" ratings, or no rating at all. The Reports state explicitly that the Bureaus do not take a position on the accuracy of the consumer complaints received by the Bureaus.

When a consumer files a complaint with a Better Business Bureau, the Bureau forwards the complaint to the subject company, so that the company can provide a response. Once the response is received, consumers are asked to let the Better Business Bureaus know whether or not they are satisfied with the outcome. Through this process, the Better Business Bureaus help to facilitate resolution of consumer complaints in the marketplace. If a company ignores a consumer complaint, the Better Business Bureaus may assign an unsatisfactory rating to the company.

Reliability Reports are an important means by which the Better Business Bureaus promote ethical marketplace conduct and provide a voice to consumers. The Reports contain general information about a company, as well as its record with the Better Business Bureaus. If a company does not respond to complaints that are forwarded to it by the Bureaus, the Bureaus inform the public. If the Bureaus receive a number of serious complaints describing the same problem, the Bureaus may issue a report rating the business as "unsatisfactory" because the complaints show a pattern of marketplace conduct. As the evidence in this case showed, petitioner received an unsatisfactory rating based on the number and kind of consumer complaints filed with the Better Business Bureaus.

Petitioner is a telemarketer and publisher of "fast-read" newsletters. By the time of trial, the Better Business Bureaus had received approximately 400 complaints from consumers who reported that they had received unordered subscriptions to petitioner's publications and then a bill for something that they did not order. The head of the Better Business Bureau of Eastern Pennsylvania testified that his review of every one of these hundreds of consumer complaints revealed a pattern of consumer claims that petitioner billed for unordered subscriptions. In 2001, the Better Business Bureaus issued a Reliability Report regarding petitioner. It stated:

> While this company responds to customer complaints presented to it by this Bureau, this company has an unsatisfactory business performance record due to a pattern of customer complaints alleging billing for unordered merchandise. Some customers have claimed that

> they cancelled subscriptions but their cancellations were not honored.

Pet. App. 3a.

The Reliability Report also contained the following disclaimer:

> As a matter of policy, the Better Business Bureau does not endorse any product, service, or company. [The Bureau's] reports generally cover a three-year reporting period, and are provided solely to assist you in exercising your own best judgment. Information contained in this report is believed to be reliable but not guaranteed as to accuracy. Reports are subject to change at any time.

Pet. App. 3a–4a (brackets in court's opinion).

Petitioner took issue with the Better Business Bureaus' Reliability Report, claiming that the numerous complaints made by consumers to the Better Business Bureaus reflected but a small portion of petitioner's total business volume. The Better Business Bureaus responded by updating the Reliability Report to read as follows:

> On March 16, 2001, Progressive Business Publications responded to the BBB concerning the company's unsatisfactory business performance report. The company sells its publications through telemarketing solicitations. It claims that it tape records telephone solicitations for quality control purposes. The company states that it obtains the ordering person's birthdate to verify the order at a later date. According to the company's correspondence, orders are confirmed by fax within 24 hours, giving the orderer an opportunity to respond. The company claims it

> has a liberal cancellation policy permitting the customer to cancel anytime within the first three months of the telephone order and receiving a refund on all unsent issues. New subscribers receive two free issues with the right to cancel according to the company. The company claims that its BBB complaint volume is negligible compared to its volume of business.

Pet. App. 4a–5a.

Petitioner employs hundreds of telemarketers to generate subscriptions to its publications. By comparison, petitioner employs fewer than ten customer service representatives to handle the consumer complaints and cancellation requests that petitioner receives. R. 1141a.[2]

According to petitioner's telemarketing director, the company's marketing employees make approximately 25 million calls per year in an effort to solicit subscriptions. Pet. App. 31a. To increase sales volume, petitioner's telemarketers offer consumers at businesses around the country a two-issue "free trial" subscription; petitioner then begins billing the consumer's employer for the subscription as soon as the "free trial" is over. Petitioner's business generates approximately $29 million in annual revenue. *Id.*

Petitioner sends the "free issues" of its mailings and a bill for hundreds of dollars to the person solicited on the telephone. If this bill is ignored, petitioner purposefully directs the next invoices for the purported order to the accounts payable department (which may have no idea whether a subscrip

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[2] "R." refers to the reproduced record filed in the Supreme Court of Pennsylvania.

tion was ordered) in the hopes that the bill will be paid. Pet. App. 2a. Petitioner admitted, notwithstanding the numerous complaints by consumers regarding this point, that petitioner intentionally omits a telephone number on its invoices. Customers thus lack a number to call to cancel the supposed "subscription." Pet. App. 45a. Nonetheless, 92% of petitioner's subscriptions eventually are cancelled. Pet. App. 30a.

After six months of non-payment, petitioner turns an account over to a collection agency, which aggressively pursues the account. At least $2 million in revenue is generated each year through collection agencies. Pet. App. 7a.

The hundreds of complaints on which the Better Business Bureaus relied in publishing the alleged defamatory statements in this case vividly demonstrate consumers' view of petitioner's business. These complaints reflect repeated efforts by consumers to cancel the supposed "free" subscriptions touted by petitioner's telemarketers. The complaints refer to petitioner's business practices as a "scam," "fraudulent," and "illegal." R. 5078a–5081a ("I believe this company is a scam."); R. 4337a–4344a ("I now am convinced that there is some kind of fraud involved in [PBP's] selling/marketing tactics."); R. 4365a–4374a ("[Progressive Business Publications] won't give up and we are not paying another bill for a SCAM."); R. 4444a–4452a ("This is blatant mail fraud."); R. 4514a–4529a ("I urge you to investigate this company, Progressive Business Publications or [*sic*] Malvern, PA. They have sent me fraudulent invoices and made illegal threats."); R. 5913a–5922a ("As I mentioned in my complaint to you, these practices of billing for magazines that have never

been received much less ordered borders on criminal behavior.").

II. THE PROCEEDINGS BELOW

The defamation case proceeded to trial in October 2003. At trial, petitioner argued that none of the complaints presented to the Better Business Bureaus had merit, that the complaint volume was negligible compared to its total sales volume, and that despite having "a record year every year" it had sustained damages as a result of the Better Business Bureaus' publication of the Reliability Report. Petitioner also argued that the Better Business Bureaus were negligent for failing to verify the accuracy of every complaint that was received. Petitioner asked the jury to award it nominal, compensatory, and punitive damages.

The Better Business Bureaus presented evidence of hundreds of complaints regarding petitioner's business practices, including the live testimony of three witnesses who themselves were frustrated in their attempts to cancel unwanted "no-risk" subscriptions to petitioner's newsletters. The Better Business Bureaus established that the statements in the Reliability Report characterizing petitioner's business practices as "unsatisfactory" were supported by the facts. The Better Business Bureaus also showed that petitioner earned record profits each year and spent large sums each year on marketing. Pet. App. 7a; 76a.

At the close of the evidence, the trial court instructed the jury on the applicable law. Included within the court's instructions was an instruction that the Better Business Bureaus were entitled to a conditional privilege to report on matters of public

concern, specifically the consumer reporting privilege. The court also instructed on the standard of fault necessary to overcome the Better Business Bureaus' conditional privilege, informing the jury that petitioner was required to prove actual knowledge of falsity or reckless disregard for the truth in order to overcome the privilege. R. 1986a. The trial court also instructed the jury on petitioner's obligation to satisfy the same standard as a precondition to any award of punitive damages. R. 1990a–1991a.

Within three hours of being charged, the jury returned a unanimous verdict in favor of the Better Business Bureaus.

After trial, petitioner moved for judgment notwithstanding the verdict and for a new trial. Among others things, petitioner challenged the standard of proof needed to overcome the Better Business Bureaus' conditional privilege in reporting on matters of public concern. Petitioner argued that under Pennsylvania law such a privilege could be overcome by a showing of mere negligence and that the heightened standard of actual knowledge of falsity or reckless disregard for truth need not be met. Acceptance of this argument, of course, would effectively eliminate the conditional privilege in Pennsylvania, because a showing of negligence is the minimal standard under which defamation liability could be imposed even in the absence of any privilege.

The trial court denied petitioner's post-trial motions. The court ruled that the jury instruction properly followed the Restatement (Second) of Torts § 600, requiring more than negligence to overcome a conditional privilege to report on matters of public concern. Pet. App. 73. The trial court further ruled that, even if the proper standard of fault was negli-

gence, petitioner could not have prevailed because (1) the alleged defamation was an expression of opinion rather than a statement of fact, (2) petitioner failed to prove that the alleged defamatory statements were false, and (3) petitioner failed to show that it suffered any damages as a result of the alleged defamation. Pet. App. 70a, 76a. Because petitioner failed on its essential elements of proof, it could not have recovered even if the standard of liability had been mere negligence.

Petitioner appealed to the Superior Court of Pennsylvania. Confirming that the statement at issue involved a matter of public concern and that the Better Business Bureaus were entitled to a jury instruction on the conditional privilege, the Superior Court affirmed the trial court and denied petitioner's request for a new trial.

Petitioner applied for review in the Supreme Court of Pennsylvania, questioning both the availability of a conditional privilege under Pennsylvania law and the proper standard of fault necessary to overcome the conditional privilege. After the case was accepted for review and fully briefed and argued, the Supreme Court of Pennsylvania ordered supplemental briefing on the issue of whether petitioner was a limited-purpose public figure, an issue that had been addressed in the trial court but had not been the subject of post-trial or appellate briefing.

The Supreme Court of Pennsylvania held that defamation defendants in Pennsylvania are no longer entitled to the protections of a conditional privilege to report on matters of public concern. In this respect, the court overruled the decisions of the trial court and the intermediate appellate court. The Supreme Court of Pennsylvania nevertheless affirmed the

judgment in favor of the Better Business Bureaus. It ruled that the record demonstrates that petitioner is a limited-purpose pubic figure and that therefore, to succeed on its defamation claim, petitioner was required to prove that the Better Business Bureaus published the alleged defamatory report with knowledge of its falsity or reckless disregard of whether the report was true or false.

The Supreme Court of Pennsylvania relied on the Fourth Circuit's opinion in *National Foundation of Cancer Research (NFCR) v. Council of Better Business Bureaus*, 705 F.2d 98 (4th Cir. 1983), which held that an enterprise or corporation could create a public controversy through its own extensive marketing and solicitation activities, rendering it a limited-purpose public figure for purposes of public comment on those activities. The Supreme Court of Pennsylvania reasoned (1) that there was a subject-matter nexus between the content of petitioner's solicitation message and the allegedly defamatory statements commenting on petitioner's business performance record based on a pattern of customer complaints, and (2) that petitioner expended significant resources soliciting business and marketing its newsletter subscriptions. Pet. App. 31a. The Supreme Court of Pennsylvania observed that as a direct result of the millions of telemarketing solicitations each year, "hundreds of complaints were sent to the Better Business Bureau, and the statements of the Better Business Bureau were limited to reporting its receipt of such complaints and concluding that [petitioner's] business record was 'unsatisfactory' on the basis of this pattern of complaints." Pet. App. 31a. As the Supreme Court of Pennsylvania ruled, the Better Business Bureaus did not create the controversy; petitioner's massive

telemarketing effort generated the controversy that was presented to the Better Business Bureaus through the large volume of consumer complaints.

ARGUMENT

The petition for a writ of certiorari should be denied because petitioner could not recover even if petitioner were not characterized as a limited-purpose public figure. In rejecting petitioner's motion for a new trial, the trial court held that the Better Business Bureaus were merely stating an opinion, that petitioner failed to prove that the challenged statements were false, and that petitioner failed to prove that it sustained any damages. Pet. App. 70a, 76a. Petitioner therefore could not have prevailed under any standard of fault.

As a consequence of petitioner's failure to prove actual damages, the only conceivable award it could have hoped to obtain was an award of punitive damages. But because the Better Business Bureaus' speech involved a matter of public concern, petitioner could not have obtained a punitive damages award without showing that the Bureaus acted with "malice," *i.e.*, with knowledge of falsity or reckless disregard of the truth. Regardless of whether or not petitioner is a limited-purpose public figure, therefore, the trial court was required to instruct the jury on the actual malice standard with respect to petitioner's punitive damages claim.

In any event, the Supreme Court of Pennsylvania properly concluded that petitioner is a limited-purpose public figure with respect to complaints, and reports of complaints, generated by petitioner's own extensive and aggressive telemarketing solicitations and related billing and collection practices. The allegedly

defamatory statements at issue all concerned petitioner's interactions with the public and consumers' reactions to petitioner's conduct. The limited-purpose public figure characterization was justified, and further review is not warranted.

I. PETITIONER FAILED TO MEET ITS BURDEN OF PROOF ON THE ESSENTIAL ELEMENTS OF ITS DEFAMATION CLAIM.

Petitioner contends that it was prejudiced by being held to the actual malice standard articulated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1976), because it is not a limited-purpose public figure under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Even if this argument had merit, which it does not, the petition for a writ of certiorari should be denied because petitioner could not prevail on its claims.

Under the Pennsylvania defamation statute, 42 Pa. Cons. Stat. § 8343, the burden of proving the truth of the allegedly defamatory communication normally falls on the defendant. Where, however, the speech in question involves a matter of public concern, which it undisputedly does in this case, the burden of proving falsity rests with the plaintiff. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986); *Lewis v. Philadelphia Newspapers, Inc.*, 833 A.2d 185, 191 (Pa. Super. Ct. 2003) ("If the statement in question bears on a matter of public concern, or the defendant is a member of the media, First Amendment concerns compel the plaintiff to prove, as an additional element, that the alleged defamatory statement is in fact false.").

In denying petitioner's motion for a new trial, the trial court ruled that "Defendants were merely

stating an opinion and therefore had no duty to investigate [the factual accuracy of the hundreds of consumer complaints they received]." Pet. App. 70a. The trial court also held that "it was Plaintiff's burden to prove that the alleged defamatory statement was false . . . [and] Plaintiff did not present such evidence." *Id.* The trial court further decided that "[b]ased on many customer complaints, there is truth to the statements published by Defendants regarding Plaintiff's unsatisfactory business performance." *Id.* at 76a.

Despite these rulings, petitioner asks this Court to grant review and hold that petitioner is not a limited-purpose public figure. Such a holding, petitioner asserts, would enable petitioner to retry this case under the lesser negligence standard and to argue that the Bureaus' "failure to investigate the complaints at issue constituted negligence." Pet. 2. The trial court, however, already concluded that even if negligence was the proper standard, petitioner could not prevail. Based on the rulings summarized above, even if this Court were to grant review and hold that petitioner is not a limited-purpose public figure under the facts of this case, the Better Business Bureaus nevertheless would be entitled to judgment in their favor.

This is also true because the trial court held that even if petitioner was correct in all of its arguments, it would not be entitled to a new trial because it "did not prove that it sustained any damages." Pet. App. 76a. The Pennsylvania defamation statute requires proof of damages that are actually and directly caused by the publication of an allegedly defamatory statement. 42 Pa. Cons. Stat. § 8343; *see Synygy, Inc. v. Scott-Levin, Inc.*, 51 F. Supp. 2d 570, 581 (E.D. Pa.

1999) (Pennsylvania does not presume damages in a defamation case, and the plaintiff must prove general damages attributable to the alleged defamatory statement); *Walker v. Grand Central Sanitation, Inc.*, 430 Pa. Super. 236, 250, 634 A.2d 237, 244 (1993) (defendant in a defamation per se case is "liable for the proven, actual harm the publication causes."). Petitioner's failure to prove damages is therefore fatal to its case regardless of the applicable standard of fault.

II. BECAUSE THE SPEECH AT ISSUE INVOLVED A MATTER OF PUBLIC CONCERN, PETITIONER'S PUNITIVE DAMAGES CLAIM REQUIRED PROOF OF ACTUAL MALICE REGARDLESS OF PETITIONER'S STATUS.

In refining the application of the actual malice standard articulated in *New York Times Co. v. Sullivan* to encompass only those private individuals who fairly can be characterized as public figures or limited-purpose public figures, the *Gertz* Court carefully restricted the States' ability to award damages under a lesser standard of liability. The Court made clear that, before a State could authorize an award of presumed or punitive damages even in the case of a purely private plaintiff, the *New York Times* standard would need to be satisfied.

> Our accommodation of the competing values at stake in defamation suits by private individuals allows the States to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by *New York Times*. This is not based on a belief that the considerations which prompted the adoption of the *New York Times* privilege for

> defamation of public officials and its extension to public figures are wholly inapplicable to the context of private individuals. Rather, we endorse this approach in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation. But ***this countervailing state interest extends no further than compensation for actual injury***. For the reasons stated below, we hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.

Gertz, 418 U.S. at 348–49 (emphasis added). The Court explained the rationale behind this limitation:

> The largely uncontrolled discretion of juries to award damages ***where there is no loss*** unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.

Id. at 349 (emphasis added).

Under *Gertz*, therefore, petitioner could not recover punitive damages unless it could prove that the Better Business Bureaus published a false and defamatory statement with knowledge of its falsity or reckless disregard of the truth. This is so regardless of whether petitioner was deemed to be a private

figure or a limited-purpose public figure—the standard of fault petitioner was required to meet as a precondition for a punitive damages recovery was the same. This is a further reason why review is not warranted.[3]

III. THE SUPREME COURT OF PENNSYLVANIA CORRECTLY HELD THAT PETITIONER IS A LIMITED-PURPOSE PUBLIC FIGURE.

As the Better Business Bureaus argued in the trial court and in response to the Supreme Court of Pennsylvania's request for post-argument briefing, petitioner qualifies as a limited-purpose public figure under the standard set forth in *Gertz*. The Court in *Gertz* identified two categories of public figures who, by virtue of that status, must satisfy elevated standards of proof when prosecuting defamation claims.

The Court held first that "an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all

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[3] Several years after *Gertz*, the Court ruled in *Dun & Bradstreet Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985), that, where the plaintiff is a purely private person and the speech at issue does *not* involve a matter of public concern, States may authorize an award of presumed or punitive damages even absent a showing of "actual malice." *Dun & Bradstreet* cannot help petitioner here, where the speech at issue undisputedly *does* involve a matter of public concern. Pet. App. 56a-57a. *See, e.g., U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 929 (3d Cir. 1990) ("When the plaintiff is a private figure but the speech involves a matter of 'public concern,' the states may define for themselves the appropriate standard of liability; however, they may not impose liability without fault, nor allow presumed or punitive damages without a showing of actual malice.").

contexts." 418 U.S. at 351. The Court also ruled that even a person who is not generally a public figure may be considered a public figure for limited purposes where the "individual voluntarily injects himself or is drawn into a particular public controversy." *Id.* In both cases, an important consideration in determining public-figure status is "the vigor and success with which [a person] seek[s] the public's attention . . . ." *Id.* at 342. When the issue is whether a person qualifies as a limited-purpose public figure, a court normally should consider the "nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Id.* at 352.

Petitioner qualifies as a limited-purpose public figure, because petitioner thrust itself before the public for the purpose of influencing consumers, and, as a consequence of petitioner's own actions, consumers responded in a critical way through complaints to the Better Business Bureaus. Petitioner has assumed the risk of such public criticism about the very manner in which petitioner has chosen to engage the public.

Petitioner has made significant and deliberate efforts to inject itself into the national consciousness through massive telemarketing, sales, and self-promotion of its offers of "no-risk" trial subscriptions to its newsletters. It is this very activity that generated the hundreds of consumer complaints that formed the basis of the Better Business Bureaus' report and of petitioner's defamation claim. The underlying controversy to which the Better Business Bureaus' single report related is a controversy that petitioner itself created. Nothing in *Gertz* or its progeny precludes an entity from becoming a limited-

purpose public figure as a result of its own commercial activities and its aggressive pursuit of the consuming public.

The cases cited by petitioner in an effort to demonstrate the contrary are inapposite. *See Hutchinson v. Proxmire*, 443 U.S. 111 (1979) (scientist who received federal funding that was categorized by a U.S. Senator as wasteful government spending held not to be limited-purpose public figure by virtue of his involvement in publicly-funded research); *Wolston v. Reader's Digest Assoc., Inc.*, 443 U.S. 157 (1979) (failure to appear in response to grand jury subpoena regarding alleged espionage on behalf of the Soviet Union held not sufficient to classify plaintiff as limited-purpose public figure). In neither case did the plaintiff himself create the public controversy through substantial contact with and solicitation of the public.

Relying on massive telemarketing, direct mail, and internet marketing campaigns, petitioner markets its fast-read newsletters to consumers around the country. R. 1420a. During the four-year period of 1998–2001 alone, petitioner spent millions of dollars on marketing. R. 2506a–2550a. Between 1998 and 2001, petitioner employed ***15,000 telemarketers*** (R. 1369a), who generated millions of calls to potential consumers. Operating on petitioner's instructions, these telemarketers told their targets that they could receive one of petitioner's 50 publications at "NO RISK," that two issues would be sent "free of charge," and that the recipients could "just write cancel and there will be no cost involved". R. 2424a-2425a. Of petitioner's approximately 600 current employees, more than 500 are telemarketers, who generate about ***25 million calls*** each year. R. 1141a; 1165a.

In addition, petitioner offered testimony that it made nearly ***74 million mailings*** in the year 2003 alone, costing petitioner more than $2 million annually. R. 1126a. Petitioner is the largest customer of its local post office. R. 1345a.

The Better Business Bureaus published a Reliability Report that commented on the controversy Petitioner created by its aggressive marketing campaign. Petitioner's own actions prompted hundreds of complaints to the Better Business Bureaus. Consumers reported that petitioner's offer was not in fact "no risk" and that they were charged for subscriptions that they did not want and that they had tried to cancel. The Better Business Bureaus did not create the controversy and drag petitioner in involuntarily. As the Supreme Court of Pennsylvania observed, Petitioner's business activity specifically generated the very issue about which the Better Business Bureaus reported. Pet. App. 31a–32a.

Given petitioner's manner of telemarketing its subscriptions to the consuming public, it is not surprising that these activities have generated the significant, negative public response evidenced by the complaints received by the Bureaus. The use of telemarketing to solicit business has become an important matter of public interest and concern. In response, in recent years, consumer advocacy groups, Congress, and the Federal Trade Commission have worked to restrict the manner in which telemarketing may be conducted in the United States. *See* Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 1601 *et seq.* (1994); Telephone Consumer Protection Act, 47 U.S.C. § 227 (1991). There can be little dispute that the manner in which petitioner predominantly markets its prod-

ucts is the subject of intense criticism and public debate.

The decision that petitioner is a limited-purpose public figure for purposes of public commentary on petitioner's own business practices in dealing with consumers is entirely reasonable and consistent with *Gertz*. Moreover, for the reasons explained above, even a contrary ruling would not produce a different outcome in this case. Especially in these circumstances, intervention by this Court is not justified.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 5, 2007

13

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No. 07-285

FILED
NOV 19 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

AMERICAN FUTURE SYSTEMS, INC. d/b/a PROGRESSIVE BUSINESS PUBLICATIONS,

Petitioner,

v.

BETTER BUSINESS BUREAU OF EASTERN PENNSYLVANIA and BETTER BUSINESS BUREAU OF METROPOLITAN WASHINGTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

Respondents do not dispute that there is a division among the Circuits and state courts of last resort on the important First Amendment question that Petitioner raises. Instead, the main thrust of Respondents' argument is their contention that the trial court made dispositive rulings in favor of Respondents on other grounds that were not disturbed on appeal.

Respondents' argument would be well-taken if the Pennsylvania appellate courts had decided those alternative grounds, in which event they would not be open for consideration on remand from this Court after a final decision of the Constitutional question. However, that is not the case here.

Petitioner challenged these alternative rulings in its appeals to both the intermediate appellate court and the Pennsylvania Supreme Court. Neither court commented or ruled on these issues.

Under the circumstances, if this Court grants the Petition and decides that the Pennsylvania Supreme Court erred as a matter of Federal Constitutional law by holding that Petitioner is a "limited purpose public figure," the Pennsylvania Supreme Court, on remand, would be able to decide the remaining issues on appeal. *See, e.g., Pap's A.M. v. City of Erie*, 812 A.2d 591 (Pa. 2002), *on remand after City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). Therefore, the Brief in Opposition does not provide any basis for this Court to deny the Petition, but merely highlights that, as often is the case, there will be further proceedings on remand if this Court decides the case in favor of Petitioner.

Respondents' argument on the merits of the Constitutional question (Brief in Opposition, pp. 16-20) likewise fails to present a basis for this Court to deny review.

Respondents' argument that Petitioner's targeted direct marketing to private businesses and select individuals constitutes Petitioner's voluntarily injecting itself into a public controversy highlights both how far afield the Pennsylvania Supreme Court and some other courts have gone from this Court's limited ruling in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and that courts throughout the United States are split on this First Amendment issue. This is an issue on which this Court, since *Gertz*, "has not offered meaningful guidance. . . ."[1] That is a reason to grant, not to deny, the Petition.

Respectfully submitted,

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1. Joseph H. King, Jr., *Deus ex Machina and the Unfulfilled Promise of New York Times v. Sullivan: Applying the Times for All Seasons*, 95 Ky. L. J. 649, 668 (2006). Petitioner does not agree with the article's thesis that the *New York Times* rule should be extended to all defamation cases. The article does further demonstrate the desirability of this Court providing greater definition to the standard misapplied by the Pennsylvania Supreme Court in this case, and also demonstrates how the decision below fails to conform to *Gertz* by departing from the requirements of voluntary participation in a public controversy.